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Supreme Court of the United States

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No. 436

BIRDIE MAE DAVIS, *et al.*,

Petitioners,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

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Opinions Below

The opinions and orders of the courts below are as follows:

1. Order of the district court filed April 25, 1963, reported at 8 Race Rel. L. Rep. 480.

2. Opinion of the court of appeals dismissing the appeal, filed May 24, 1963, reported at 318 F.2d 63.

3. Opinion and order of the district court filed June 24, 1963, reported at 219 F. Supp. 542.

4. Opinion of the court of appeals issuing an injunction pending appeal July 9, 1963, and denying rehearing July 18, 1963, reported at 322 F.2d 356.[1]

5. Order of the district court filed July 26, 1963, reported at 8 Race Rel. L. Rep. 901.

6. Order of the district court filed August 23, 1963, reported at 8 Race Rel. L. Rep. 907.

7. Opinion of the court of appeals filed June 18, 1964, reported at 333 F.2d 53.[2]

8. Order of the district court issued June 29, 1964, reported at 9 Race Rel. L. Rep. 1177.

9. Order of the district court issued July 31, 1964, reported at 9 Race Rel. L. Rep. 1179.

10. Opinion and order of the district court issued March 31, 1965, reported at 10 Race Rel. L. Rep. 1016.

11. Opinion of the court of appeals filed August 16, 1966, reported at 364 F.2d 896.

12. Opinion and order of the district court filed October 13, 1967, reported at 12 Race Rel. L. Rep. 1820.

13. Opinion of the court of appeals filed March 12, 1968, as modified on denial of rehearing, April 26, 1968, reported at 393 F.2d 690.

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[1] Stay denied, 84 S.Ct. 10, 11 L.Ed.2d 26 (1963) (Mr. Justice Black, in Chambers); cert. denied, 375 U.S. 894 (1963).

[2] Cert. denied, 85 S.Ct. 85 (1964).

14. Opinion and order of the district court filed July 29, 1968, unreported.

15. Order of the district court filed August 2, 1968, unreported.

16. Order of the district court filed December 20, 1968, unreported.

17. Order of the district court filed March 14, 1969, unreported.

18. Order of the court of appeals denying injunction pending appeal, filed March 20, 1969, unreported.

19. Order of the district court filed April 7, 1969, unreported.

20. Order of the court of appeals granting reconsideration and issuing injunction pending appeal, filed May 6, 1969, unreported.

21. Opinion of the court of appeals filed June 3, 1969, reported at 414 F.2d 609.

22. Opinion and order of the district court filed August 1, 1969, unreported.

23. Opinion of the court of appeals filed December 1, 1969, reported at 419 F.2d 1211.

24. District court order of January 28, 1970, unreported.

25. Opinion and order of the district court filed January 31, 1970, unreported.

26. Order of the district court filed February 4, 1970, unreported.

27. Opinion of the court of appeals filed February 16, 1970, reported at 422 F.2d 1139.

28. Order of the district court filed February 27, 1970, unreported.

29. Order of the district court of March 12, 1970, unreported.

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32. Order of the district court of March 31, 1970, unreported.

33. Order of the district court of April 14, 1970, unreported.

34. Opinion of the court of appeals filed June 8, 1970, not yet reported.

35. Judgment of the court of appeals issued June 8, 1970.

36. Order of the district court of June 12, 1970, unreported.

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38. Opinion-order of the district court filed July 13, 1970, unreported.

39. Opinion-order of the district court issued July 30, 1970, unreported.

40. Opinion of the court of appeals issued August 4, 1970, not yet reported.

41. Judgment of the court of appeals issued August 4, 1970, recalling the judgment issued June 8, 1970, and substituting therefor.

42. Opinion-order of the court of appeals issued August 28, 1970, not yet reported.

43. Orders of the district court filed September 4, 1970, unreported.

Jurisdiction

The judgment of the court of appeals was entered on June 8, 1970. Additional orders supplementing the mandate were entered August 4, 1970, and August 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The petition for a writ of certiorari was filed in this Court on July 23, 1970. August 31, 1970, the Chief Justice entered an order setting a briefing schedule and argument date, and deferring action on the petition.

Constitutional Provision Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

Upon request from the courts below, the United States Department of Health, Education, and Welfare developed several plans to desegregate public schools in Mobile County, Alabama. One plan integrated each school in the system by establishing a number of school pairings and clusters which necessitate the incidental transportation of both black and white students. This technique of student assignment—the use of school attendance zones with non-contiguous parts and the transportation of students—had long been used in the Mobile school system to maintain segregated schools. In spite of this history and without any evidentiary hearing in the district court, the court of appeals rejected this H.E.W. plan and ordered the implementation of a plan which leaves 50% of the black elementary students in metropolitan Mobile in all-black schools. The rejection of the H.E.W. plan was based solely on the court's deference to a hypothetical "neighborhood school concept" which Mobile's history demonstrates it never had. Two questions are presented to this Court:

(1) Whether black students are denied the equal protion of the laws when in the name of a newly conceived "neighborhood school concept" they continue to be assigned to segregated black schools despite the availability of alternative methods of student assignment which would desegregate every school in the system and which are proved workable by the school board's past use of the same assignment techniques, and

(2) Whether petitioners are entitled to an evidentiary hearing in the district court prior to the approval of a final desegregation plan?

Statement

1. *A Brief Overview of the School System.*

Mobile has a combined rural and metropolitan school system serving the whole of Mobile County. It is the largest school system in Alabama. During the 1969-70 school year, 91 schools served 73,504 students, of whom 42,620, or 58%, were white and 30,884, or 42%, were black.[3]

Throughout the litigation to desegregate Mobile's schools, the rural and metropolitan portions of the system have been treated separately. Since September 1969, the rural portion of the system has been desegregated adequately and this brief concerns only the metropolitan area comprised of the contiguous cities of Mobile, Prichard and Chickasaw. Within the metropolitan area, 65 schools served 54,913 students during 1969-70, of whom 27,769, or 50.5%, were white and 27,144, or 49.5% were black.

In addition to the rural-metropolitan division, another division has more recently been advanced in this litigation. This newer division is between the eastern and western parts of the metropolitan area with Interstate Highway

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[3] The school board is under an order to submit reports to the district court and opposing counsel within one week after the beginning of every school year "showing the number of students by school, grade, and race, expected and actually enrolled at the schools in Mobile County." 393 F.2d at 699. The statistics cited in this brief overview are taken from the school board's last report which was filed on November 20, 1969, more than two months after it was due and only after petitioners and the United States moved to hold board officials in contempt. If the school board complies with the order this year and files reports within a week of the system's September 9, 1970, opening, the petitioners will be able to furnish the Court with current statistics. Most importantly, the school board report will indicate the actual results of the desegregation plan implemented by the courts below.

I-65 used as a north-south divider.[4] The western part is predominantly white with 17 schools serving 13,875 students during 1969-70, of whom 12,172, or 88%, were white and 1,703, or 12%, were black. These statistics reflect the concentration of a majority of Mobile's black citizens in a racial ghetto located in the northeastern part of the City.

The controversy which led to the inclusion of Mobile among the cases considered by this Court in *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970), concerned the decisions of the courts below to treat separately the predominantly white and majority black parts of metropolitan Mobile by permitting the formulation of separate plans for each and delaying the desegregation of the majority-black part until 1970-71. Now that this Court's mandates in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969), and *Carter* v. *West Feliciana Parish School Board, supra,* have precluded any further delays by making clear that desegregation must be accomplished "now" the school board and the courts below have justified the continued segregated education of at least 50% of the black elementary school students living in metropolitan Mobile by continuing to insulate the predominantly white portions of metropolitan Mobile from participation in a system-wide plan of desegregation through the adoption of a "neighborhood school concept."

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[4] I-65 is a federally aided highway which for a considerable extent of its route through Mobile acts as the dividing line between black and white residential areas; it was constructed during the 1960's.

2. *Summary of Proceedings in the Courts Below.*

This action by black parents and students to desegregate Mobile County's public schools began in 1963.[5] The United States intervened in 1967 as a plaintiff pursuant to 42 U.S.C. § 2000h-2 and has participated in all stages of this litigation since that time. Successive groups of white parents intervened in 1968 and earlier this year to press for the adoption of freedom-of-choice plans. Neither group of white parents participated in the recent proceedings in the court of appeals nor responded to the petition for certiorari.

a. *March 1963—June 1969.*

The early years of this litigation were consumed by petitioners' efforts against strong resistance to *initiate* the desegregation process in Mobile. The first of the many appeals in this action concerned the district court's failure to rule on petitioners' motion in March, 1963, to begin inte-

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[5] The school board, although petitioned on several occasions by black citizens, did nothing to begin desegregation between 1954 and 1963. As Judge Tuttle subsequently stated:

> It must also be borne in mind that this school board ignored for nine years the requirement clearly stated in *Brown* that the school authorities have the primary responsibility for solving this constitutional problem.

Davis v. *Board of School Commissioners of Mobile County*, 364 F.2d 896, 898, n. 1 (5th Cir. 1966) (67a). The delay in initiating desegregation has been further compounded by the painfully slow progress of this litigation. In a recent opinion in a collateral proceeding Judge Goldberg observed:

> For almost a decade there have been judicial efforts to desegregate the schools of Mobile County, Alabama. We do not tarry now to count the many appeals to this court in furtherance of this hope, for we are concerned today with only a single recent episode in this almost Homeric Odyssey. We wonder when the epilogue will be written.

Davis v. *Board of School Commissioners of Mobile County*, 422 F.2d 1139, 1140 (5th Cir. 1970) (611a).

gration in the 1963-64 school year. The court of appeals denied relief while instructing the district court that Mobile's schools were unlawfully segregated and that it was under a duty to rule promptly on petitioners' motion. *Davis* v. *Board of School Commissioners of Mobile County*, 318 F.2d 63-64 (5th Cir. 1963) (3a). After the district court did rule by postponing any relief until the 1964-65 school year, petitioners appealed and the court of appeals ordered the school board to start desegregation by enrolling without discrimination only those first grade students, and other students moving into the county for the first time, who satisfied the stringent requirements of the Alabama Pupil Placement Law. *Davis* v. *Board of School Commissioners of Mobile County*, 322 F.2d 356, *amended in part on rehearing*, 322 F.2d 359 (5th Cir. 1963) (14a), *stay denied*, 11 L.Ed.2d 26 (Mr. Justice Black, Circuit Justice), *cert. denied*, 375 U.S. 894 (1963), *rehearing denied*, 376 U.S. 928 (1964). On remand the district court ordered the implementation of a plan which was limited to high school seniors and excluded first grade elementary students. Another appeal followed immediately and the court of appeals ordered the implementation of the assignment and transfer provisions of the Alabama Pupil Placement Law at a rate faster than one grade a year and required the abolition of Mobile's dual attendance zones as the plan affected each additional grade. *Davis* v. *Board of School Commissioners of Mobile County*, 333 F.2d 53 (5th Cir. 1964) (36a), *cert. denied*, 379 U.S. 844 (1964).

In response to the orders to abolish dual attendance zones Mobile devised an assignment plan which the court of appeals in a fourth appeal struck down as effectively perpetuating the effects, if not the form, of the dual system. First, attendance zones were drawn which conformed generally with the racial character of neighborhoods and assignments

from elementary schools to junior high schools and then to senior high schools were determined on a racial basis. *Davis* v. *Board of School Commissioners of Mobile County*, 364 F.2d 896, 900 (5th Cir. 1966) (67a). Then, students "were given the option of attending the school of their 'area' (unmistakingly identifiable as either a Negro or white 'area') or the nearest school, outside the area, *formerly* predominantly of the race" (*id.* at 903), a device which the court of appeals found was plainly designed to permit white students living in a black area to transfer to white schools and "a plain violation of the oft-repeated requirement that dual school zones must be abolished" (*ibid.*). As a result, the court of appeals found that "less than two-tenths of one percent of the Negro children in the system are attending white schools" and concluded "there is no true substance in the alleged desegregation" (*id.* at 901).

The school board then responded by drawing new boundary lines for some metropolitan attendance areas but still, rather than actually assigning students to schools serving their attendance area, offering options to students to attend either the school serving his attendance zone or the nearest "formerly" white or black school. Although little additional desegregation occurred (only 692, or 2%, of Mobile's black students attended white schools), the district court approved the school board's plan and petitioners appealed for the fifth time. The court of appeals found that the results of the board's plan "make inescapable the inference that discrimination yet exists." *Davis* v. *Board of School Commissioners of Mobile County*, 393 F.2d 690, 693 (5th Cir. 1968) (122a). Addressing itself solely to schools in metropolitan Mobile, the court of appeals rejected the school board's zones and ordered the redrawing of attendance areas "according to strictly objective criteria

with the caveat that a conscious effort should be made to move boundary lines and change feeder patterns which tend to preserve segregation." *Davis* v. *Board of School Commissioners of Mobile County,* 393 F.2d 690, 694 (5th Cir. 1968) (122a). The court of appeals further ordered that following the revision of attendance zones all students should be required to attend the school serving their zone in the absence of a compelling non-racial reason (*id.* at 697). In the rural portion of the system the court of appeals allowed the board to use a freedom-of-choice plan (*id.* at 695).

Once again a remand to the district court failed to result in an adequate desegregation plan. Three appeals were taken from orders of the district court (the sixth, seventh and eighth in this litigation), consolidated by the court of appeals, and decided on June 3, 1969. *Davis* v. *Board of School Commissioners of Mobile County,* 414 F.2d 609 (5th Cir. 1969) (186a). The current phase of this case began with this decision.

b. *June 1969—June 1970.*

The main issue before the court of appeals in June 1969 was whether the school board and the district court had complied with the previous decision of the court of appeals in establishing school attendance zones for elementary and junior high schools, and maintaining freedom of choice for high school students in metropolitan Mobile. A second issue was retention of freedom of choice for all students in rural Mobile County. The court of appeals found that the district court had "ignored the unequivocal directive to make a conscious effort in locating attendance zones to desegregate and eliminate past segregation." 414 F.2d at 610. Freedom of choice in metropolitan high schools and all rural schools, where only 6% of all black

students attended white schools, was also held to be unacceptable. Accordingly, the court of appeals ordered the prompt formulation of a plan "to fully and affirmatively desegregate all public schools in Mobile County, urban and rural . . ." and directed the district court to request the Office of Education, of the United States Department of Health, Education, and Welfare to collaborate with the school board and submit its own desegregation plan if agreement with the board was not possible (*ibid.*).

The original plan of the team of educators organized by H.E.W.,[6] consistent with the court of appeals' directions, placed the initiative with the school board. The board was asked to develop a plan which would be jointly reviewed by the H.E.W. team and school officials to determine whether amendments could be made to increase desegregation by changing zone lines, pairing schools, and re-

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[6] Four educators were involved in the preparation of H.E.W. recommendations: Mr. Jesse Jordan, the Senior Program Officer in the Atlanta Regional Office of the Equal Educational Opportunities Division of the United States Office of Education represented the Department of Health, Education and Welfare. Prior to joining H.E.W. Mr. Jordan had been a teacher, principal, and Assistant Superintendent of Schools in Cobb County, Georgia. The actual study of Mobile was undertaken by Dr. Joe Hall, a Visiting Professor of Education at the University of Miami and Assistant Director of the Florida School Desegregation Consulting Center. The desegregation center is located at the University of Miami and financed under Title IV of the Civil Rights Act of 1964. Prior to joining the desegregation center, Dr. Hall served eleven years as Superintendent of Schools for Dade County (Miami), Florida. Dr. Hall also has been employed as a teacher and principal in Carrabelle and Leon County, Florida, Director of the Division of Instruction in the Florida State Department of Education, and Director of Instruction, Assistant Superintendent for Instruction and Associate Superintendent of Instruction in Dade County, Florida (362a). Dr. Hall was assisted by Dr. Michael Stolee, Director of the Florida School Desegregation Consulting Center, and Dr. Larry Weinkoff of the University of South Carolina.

structuring grades (396a).[7] School officials did develop plans for both rural and metropolitan schools. However, after joining the H.E.W. team in a review of the rural plan school officials severed working relationships with H.E.W. and obliged the H.E.W. team to prepare its own recommendations (440a).

In the absence of agreement with the school board, H.E.W. submitted its own county-wide desegregation plan on July 10, 1969.[8] The plan provided for zoning all schools

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[7] The school board took the depositions of Dr. Hall and Mr. Jordan on July 15 and 16, 1969, after H.E.W. submitted its report to the district court on July 10, 1969. The depositions were filed in the district court on July 23, 1969, but in the absence of any evidentiary hearing on H.E.W.'s plan were never moved into evidence. Apart from subsequent self-serving affidavits prepared by Mobile's Associate Superintendent of Schools, James A. McPherson, these depositions are the only testimony concerning the preparation of H.E.W.'s July 10, 1969 plan. An effort by the United States to depose William B. Crane, president of the Mobile School Board and Associate Superintendent McPherson was blocked when the district court granted the school board's motion that these depositions not be taken (Docket Sheet No. 12).

[8] The failure of the school board to cooperate with H.E.W. in preparing a plan for metropolitan Mobile inevitably meant that there would be inaccuracies in H.E.W.'s recommendations. Dr. Hall described the July 10, 1969, report as a "basic concept" (413a) in which "adjustments" would be necessary (412a). Among the reasons why complete accuracy was not possible was that the school board never amended the statistical information furnished by it to the district court in 1968 pursuant to an order of the court of appeals, 393 F.2d at 698. Aware of this fact, Dr. Hall specifically invited the school board to correct H.E.W.'s work. In a colloquy with the school board's attorney, Dr. Hall said: "If you or the members of the school system found some error, I think you would have an obligation to tell us." The school board attorney responded: "I am sure we would if we did" (439a). The district court reiterated H.E.W.'s invitation to the school board: "H.E.W. readily acknowledges that this plan is not perfect and invites the school board to suggest improvements". Yet, in spite of the fact that this invitation was ignored, the school board has continued to cite inaccuracies in H.E.W.'s recommendations. Subsequently, the court of appeals noted the school board's failure to cooperate in response to the board's claim that H.E.W. was inaccurate: "The defendants warn

in rural and metropolitan Mobile (some schools would be paired within zones), closing four black schools in eastern Mobile, and transporting 2,000 black students from the closed schools to white schools in the western and southern parts of the metropolitan area. The plan failed in two respects to adequately desegregate Mobile's schools: (1) it retained five large all-black elementary schools serving 5,500 students because H.E.W. was unwilling to recommend the transportation of white students in addition to the transportation of black students; and (2) the plan deferred desegregation in eastern metropolitan Mobile, where 85% of the system's black students live, until 1970-71.

The retention of all-black schools in H.E.W.'s plan was explained by H.E.W. in terms of its uncertainty whether "assignments legally are required to be in the desegregation plan if they require substantial additional transportation," an issue which H.E.W. considered to be "a legal question which we can only leave to the parties and to the court" (329a). In reality, however, H.E.W. was less concerned about the legality of transportation generally than it was about the transportation of white students.

As an educational matter, Dr. Joe Hall, who was principally in charge of preparing H.E.W.'s recommendations, stated that while he always felt that it was better to have less than more busing, he "always recognized that you had to have busing in order to operate schools to get groups of people together for educational purposes" (369a), that "in our society today it is good for whites and

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that the figures used by the Department of Justice and H.E.W. are inaccurate. This may be true but the defendants, the only parties in possession of current and accurate information, have offered no help. This lack of cooperation and generally unsatisfactory condition, created by defendants, should be terminated at once by the district court".

blacks to have associational experiences in a school situation with each other" (371a), and "if it takes some bussing to achieve that, I would say it would be to the advantage of all the children concerned" (372a). Concerning the competing value of neighborhood schools, Dr. Hall held the view that while as a "general proposition" he would not favor assigning children to schools outside their neighborhoods, he did favor such assignments "as a specific proposition to achieve desegregation" (379a). He noted that "all of us in education have been brought up with the idea that the neighborhood school was a good idea, and that the community and the school should work together as a total situation (but) again I have undergone some change in my thinking because in your metropolitan areas your neighborhoods break down and you just don't have the neighborhood any more even though you have a group of people that live close together" (379a-380a).[9]

However, in applying these views, Dr. Hall only recommended the transportation of black students to available spaces in white schools. As for the transportation of both white and black students, Dr. Hall stated that "at this *point* in our educational philosophy we have not been willing to go to the cross-bussing idea" (448a) (emphasis added). In his view "cross-bussing doesn't have the financial support or the legal support or the community support *unless something in this case decides that it does the legal support*" (449a) (emphasis added). Of all

[9] Mr. Jordan, in his deposition, expressed the view that it is desirable to assign students to schools outside their neighborhoods "if they obtain (a) better education where they are being transferred to. . . . I think it's better to take (students) to the point where they can get the better education. Now, firmly believing, based on research, that desegregated education is superior to segregated education, if a community school results in segregated education, then I think that is bad education" (477a).

these factors, it was the legal question to which Dr. Hall would return. Speaking of the problem of desegregating the remaining all-black schools he said: "[W]e could not figure out a way to do that without getting into the problem of cross-bussing and we didn't have a legal decision yet on busses" (452a). The "long-range" solution which Dr. Hall envisaged was the construction of new schools in integrated areas. For the present, in response to the question whether students in all-black schools "will then continue to suffer as those in the past for the lack of better educational opportunities," Dr. Hall testified: "That's right, and the only recommendation, the only part (sic) I can say at all to justify that is . . . that the school system ought to make a strong effort there for other aspects of compensatory education, which I said I didn't think were as effective as integration" (453a-454a).

Petitioners moved for an order implementing the H.E.W. plan with amendments requiring the desegregation of the five remaining all-black elementary schools and the immediate implementation of a plan throughout all of Mobile. The United States moved for an order requiring the implementation of the H.E.W. plan without modifications, and the school board moved to strike and expunge the H.E.W. plan from the record but, in the words of the district court, "filed absolutely no plan for the assistance of the court".

The directions of the court of appeals required that "[f]or plans as to which objections are made or amendments suggested or which in any event the District Court will not approve without hearing, the District Court *shall commence hearings* beginning no later than ten days after the time for filing objections has expired." 414 F.2d at 611 (emphasis added). Nevertheless, in spite of petitioners' timely objections, the district court, without an evidentiary

hearing, denied petitioners' motion on August 1, 1969.[10] The district court's order provided only for the implementation of H.E.W.'s plan for rural and western metropolitan Mobile as modified by the court to eliminate the H.E.W. proposal to transport 2,000 black students in northeastern metropolitan Mobile to white schools in western and southeastern metropolitan Mobile. The order also accepted H.E.W.'s plan to defer desegregation in eastern metropolitan Mobile until 1970-71. Moreover, without the benefit of evidence, and without offering any elaboration, the district court rejected H.E.W.'s deferred plan for eastern metropolitan Mobile by finding that the plan "contains some provisions which I think are both impractical and educationally unsound". The district court accordingly ordered the school board to file a desegregation plan by December 1, 1969, and directed further collaboration with H.E.W.

Petitioners appealed the delay, the court of appeals affirmed,[11] Mr. Justice Black ordered the school board to prepare for desegregation by February 1, 1970,[12] and this Court reversed the delay.[13] The case returned to the district court in late January 1970 for second semester implementation of a plan to complete the desegregation of Mobile's schools.

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[10] The district court did hold an *ex parte* conference with the school board and H.E.W. officials on July 3, 1969. Petitioners' attorneys had no notice of the meeting and were not present. The meeting was acknowledged by the school board's attorney in his motion to Mr. Justice Black in July 1969 seeking a stay of the court of appeals' June 3, 1969, decision.

[11] *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1970).

[12] 38 U.S.L.W. 3220 (1969).

[13] *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970).

In the meanwhile, H.E.W. had submitted two additional plans to the district court on December 1, 1969.[14] Using the July 10, 1969 plan as a base (and labeling it Plan B), H.E.W. proposed one modification (Plan B Alternative) which totally eliminated the transportation of students by continuing in operation the four black schools which the July 1969 plan closed. Plan B Alternative would leave nine all-black schools serving 7,971 students. The second modification (Plan B-1 Alternative) recommended closing two black schools, and pairing or clustering all other black schools in eastern Mobile with white schools in western or southern Mobile. Transportation of both black and white students would be required and all schools in the system would be integrated.[15]

The same day the school board submitted its own plan for eastern Mobile. It assigned 18,832 black students to 21 all or nearly all-black schools.[16]

The district court called attorneys for all parties to a "pre-trial conference" in chambers on January 23, 1970 (603a). At the conference the following positions were taken: (1) petitioners contended that the elementary school provisions of H.E.W.'s Plan B-1 Alternative and the junior and senior high school provisions of H.E.W.'s Plan B should

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[14] The December 1, 1969, recommendations were prepared by Mr. Jordan's successor, Ernest E. Bunch, Acting Senior Program Officer in the Atlanta Regional Office, Equal Opportunities Division of the United States Office of Education.

[15] Plan B-1 Alternative involved only elementary schools. For junior and senior high schools it proposed to incorporate the provisions of Plan B.

[16] Petitioners, despite repeated requests, were not served with a copy of the board's plan and had to move on January 2, 1970, for an order compelling service which was not made until the district court granted the motion February 27, 1970.

be implemented forthwith, but if the transportation proposals made immediate relief impossible and the district court selected another plan *pendente lite*, then a hearing should be promptly set to determine a permanent plan; (2) the United States proposed that the H.E.W. plan involving no transportation (Plan B Alternative) be implemented *pendente lite* while discovery and hearings on a permanent plan proceeded; (3) the school board argued against any changes in its operations; and (4) the district court stated it would not consider the plans petitioners supported and that the school board's December 1, 1969, plan was unacceptable without modifications.

The district court concluded the conference by asking the school board for modifications of its December 1, 1969, plan and the United States "for [a] revision of the H.E.W. plan which the government thought should be followed for the remainder of the present school year" (*ibid.*). The school board failed to respond to the court's request.[17] The United States submitted a revision of H.E.W.'s no-transportation alternative (Plan B Alternative) "as a plan which could be implemented immediately to remain in effect only for the present school year." [18] Then, despite its own characterization of the January 23 conference as a

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[17] In its January 31, 1970, order, the district court commented on the board's failure:

> The school board and its staff of administrators and professional educators, who know the Mobile Public School System best, who have all the facts and figures which are absolutely necessary for a meaningful plan, have not assisted or aided the Court voluntarily. Consequently, the plan which is by this decree being ordered is not perfect. . . .

[18] Brief for the United States in the court of appeals, p. 22. The memorandum of the United States in this Court in response to the Petition for Certiorari reiterated the government's position that in the district court its plan had been proposed only for implementation "immediately, *pendente lite*, to remain in effect until the conclusion of the then-current school year" (p. 2, n. 1).

"pretrial conference" and both petitioners' and the United States' clearly stated position that plaintiffs sought only mid-year relief *pending* hearings on a permanent desegregation plan, the district court without an evidentiary hearing entered an order on January 31, 1970, which purported to finally disestablish the dual system in Mobile (603a).

Mindless of its expressed view at the January 23, 1970, conference that the board's proposals were unacceptable, the district court's order adopted the school board's December 1, 1969, plan with only several modifications. The order left 18,623 black students, or 60% of the system's black students, in 18 all- or nearly all-black schools (680). The court dismissed H.E.W.'s Plan B-1 Alternative, which would establish pairing and clusters of non-contiguous zones and require transportation of students, by making the general observation that it "would require busing of children from areas of the city to a different and unfamiliar area (603a) and by singling out one[19] of the sixteen H.E.W. proposed pairs or clusters, presumably to illustrate the court's conclusion that H.E.W.'s proposal was "motivated for the sole

[19] The one elementary arrangement which the court singled out involved three schools, two white and one black, in a cluster. All students in the cluster would attend one of the white schools for the first and second grades, the second white school for the third grade, and the black school for grades four through six. Of the remaining fifteen elementary school arrangements in H.E.W.'s Plan B-1 Alternative, only one other was similar. Eleven involved only two schools with all students attending either the black or white schools for two or three years and then attending the other school for the remaining elementary school grades. Three other arrangements involved three schools, but required attendance at only two schools. Under these arrangements all students in the cluster would attend one school for grades one and two and then divide, with one-half attending the second school in the cluster for grades three through five and the other half attending the third school for the same grades. Neither the simple pairing of two schools serving noncontiguous black and white zones nor this latter type of clustering were discussed by the district court.

purpose of achieving racial balance" (*ibid.*). Similarly, the court dismissed H.E.W.'s Plan B for junior high schools by citing but one atypical proposal to establish a cluster of three junior high schools, stating that in the court's view "the Supreme Court has not held that such drastic techniques are mandatory for the sole purpose of achieving racial balance" (*ibid.*).

Petitioners, the United States, and the school board, appealed. Petitioners challenged both the failure of the district court to conduct an evidentiary hearing before ordering a final plan and the court's failure to require the school board to implement H.E.W.'s plan to establish noncontiguous pairings and clustering and transport both black and white students to achieve complete desegregation. The United States, while acknowledging that "if the past practices of the school board can be relied upon as a guide, they suggest that implementation of any of these plans would be feasible," asked the court of appeals to require the implementation of H.E.W.'s sole no-transportation plan for the negative reason that "no argument can be made that Plan B Alternative, which is the most modest plan, is either educationally unsound or administratively unfeasible." [20] The school board, although cross appealing, sought affirmance of the district court's order.

The court of appeals, after remanding for further findings of fact,[21] decided the appeal on June 8, 1970. The court defined its judicial task in these words:

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[20] Brief for the United States in the Court of Appeals, p. 47.

[21] The remand was required by the district court's failure to determine how the school board's plan, which it adopted, would affect the racial composition of any of the system's schools. The remand also directed the district court to make findings on the extent of desegregation of faculty, transportation and extracurricular activities. Petitioners moved in the district court on April 6, 1970, to establish a procedure whereby after the board submitted

> We have examined each of the plans presented to the district court in an effort to determine which would go further toward eliminating all Negro or virtually all Negro student body schools while at the same time maintaining the neighborhood school concept of the school system.

In the court's view the neighborhood assignment system allows two alternatives. One alternative requires the assignment of each student to the school nearest his home with such assignments limited only by the capacity of the schools. *Ellis* v. *Board of Public Instruction of Orange County, Florida,* 423 F.2d 203, 207 (5th Cir. 1970). The other alternative is the establishment of attendance zones "on a discretionary basis as distinguished from a strict neighborhood assignment . . . ." *Mannings* v. *Board of Public Instruction of Hillsborough County, Florida,* No. 28643 (5th Cir., May 11, 1970) (Slip Op., p. 6). Mobile, the court concluded, had itself chosen not to use "the strict neighborhood assignment system" but instead uses "discretionary zone lines" (Court of Appeals, June 8, 1970). As Mobile had made that decision for itself the court ruled that the desegregation plan "can be greatly improved by pairing some schools located in proximity to each other . . . [and] also be improved by recasting the grade structure in some of the buildings, but, at the same time, maintaining the neighborhood school concept" (*ibid.*).

The plan which found favor with the court was the plan submitted by the United States as a modification of H.E.W.'s no-transportation Plan B Alternative. The plan

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proposed findings of fact an evidentiary hearing would be held. The school board submitted an affidavit which the district court accepted *in toto* "excluding self-serving declarations and speculative opinions." Order of April 14, 1970. Petitioners' motion for a hearing was denied the same day.

left 8,515 black students in all- or nearly all-black schools (*ibid.*). The court required modifications of the plan to reduce the number of black students in all-black schools to 7,725 students in 8 elementary schools, which it noted amounted to 25% of Mobile's black students being assigned to all-black schools (*ibid.*). In terms of elementary school students in metropolitan Mobile, the plan resulted in the assignment of 58% of black elementary school students to all-black schools.

These results were justified by the court in four ways: (1) "every Negro child would attend an integrated school at some time during his education career"; (2) "the all Negro student body schools which will be left after the implementation of the Department of Justice plan, as modified, are the result of neighborhood patterns"; (3) the remaining segregation can be "alleviated" through a policy allowing black students to transfer to white schools with transportation provided; and (4) the situation may be further alleviated by the establishment of a bi-racial committee to serve in an "advisory capacity" to the school board (*Ibid.*).

c. *June 1970—August 1970*

The court of appeals remanded the case to the district court with instructions to implement a new plan by July 1, 1970. On remand the district court on June 12, 1970 ordered the implementation of the plans submitted by the United States except for amendments to two school districts which the court announced it would make.

Then, on July 13, 1970, with neither notice to petitioners that revisions in attendance areas were being considered nor an evidentiary hearing, the district court issued an order establishing new attendance zones for metropolitan Mobile. The order recited as its authority a provision in

the court of appeals June 8, 1970 decision that the district court may make adjustments based on current demographic information possessed by the school board (699a). However, there is no indication that the school board officially furnished any such demographic data to the district court; at least no new demographic information has ever been served by the school board on petitioners.[22] Two weeks later, on July 27, 1969, information showing projected enrollments by race at each metropolitan school under the district court's July 13, 1970 plan was filed in the Clerk's office, presumably by the district judge although the origin of the information is unclear and its accuracy unverified (Docket Sheet No. 16). The projections revealed extensive changes between the plan approved by the court of appeals on June 8, 1970, and the plan ordered by the district court. The district court also dissolved three proposed school pairings and closed one black school. Petitioners and the United States appealed.

On August 4, 1970, the court of appeals affirmed the district court's entire revision of its June 8, 1970 decision with the exception of the district court's dissolution of one elementary school pairing which the court of appeals again ordered paired (704a). Relying on the statistics furnished

[22] The court of appeals when it first ordered the school board to redraw its attendance zones required the board to undertake a survey of the school system and, *inter alia*, prepare maps showing the location, by race and grade, of each student in the school system during the 1967-68 school year. 393 F.2d at 698. Accordingly, pupil locator maps were not only filed but also provided to petitioners and the United States. The purpose of the pupil locator maps and other survey information was to provide to the district court and the parties evidence to test the racial consequences of any new attendance zones established by the board. 393 F.2d at 693-94. If new information on residential patterns was used by the district court to establish new attendance zones then that new information should have been furnished to allow petitioners to assess the consequences of any such revisions.

by the district court, which as noted above were unverified, the court of appeals concluded that the district court's amendments as modified by the court of appeals would reduce the number of all-black schools to 6, and the number of black students attending these schools to 5,310, or 17% of all black students in Mobile County and consequently constituted an "improved result". However, this conclusion is marred by the fact that the district court's order unaccountably fails to assign 1,740 black students to any schools.[23] Nevertheless, it still appears that at least 50% of black elementary students in metropolitan Mobile have been assigned to all-black schools.[24]

In order to allow this Court to consider its August 4, 1970 decision to be "the final order on this appeal for mandate and certiorari purposes" the court of appeals recalled and amended the mandate issued after its June 8, 1970 decision (704a). However, the court of appeals acted without knowing that several days earlier, on July 30, 1970, the district court had once again, without a hearing, established new zone lines to govern attendance in metropolitan Mobile. The district court's order explained two zone line changes, stated that since the July 13, 1970 order the school board had suggested certain changes (petitioners were never notified that zone changes had been proposed by the

[23] The last attendance report filed by the school board shows 25,441 black students attending schools in metropolitan Mobile. The district court plan approved by the court of appeals assigns only 23,701 black students to metropolitan schools. This inaccuracy underscores the need for evidentiary hearings prior to the entry of orders governing a school system as complex as Mobile. If the board's reports for the current year show that these black students reappear at all-black schools, then the improvement found by the court of appeals will prove illusory.

[24] Petitioners' calculations from the data in the court of appeals August 4th opinion show 5,351 black students assigned to all-black elementary schools out of a total black metropolitan elementary school population of 10,648.

school board and indeed no amendments were ever filed by the board), and found that "some changes" should be made but that "these changes in the court's opinion have no racial significance" (702a). No statistical projections of the effects of these zone line changes were filed until three weeks later, on August 20, 1970, when the district court filed projections which again were unverified (Docket Sheet No. 17).

Petitioners appealed for the thirteenth time in the history of this litigation, Judge Bell conducted a pre-hearing conference with counsel, and on August 28, 1970, the court of appeals "terminated" the appeal. Rather than merely "some changes," the court of appeals found that "the July 30, 1970 order makes change in the attendance zones of 32 separate schools" (720a). The court further found that while "some of the changes had no effect from the standpoint of desegregation [o]thers diminished the degree of desegregation accomplished in the prior orders of this Court and the district court." The court rejected the district court's new junior and senior high school zones and accepted the district court's elementary school zones while requiring some modifications (*ibid.*). The record does not show what the effect of the modifications will be on the extent of desegregation. Finally, the court of appeals, responding to the problems caused by the continuing *ex parte* dealings between the school board and district court ruled that "henceforth, any time the school board desires to have changes in zone lines, it shall give reasonable notice to the parties" (*ibid.*).

3. *The Techniques of Segregation.*

Although the district court has not permitted any evidentiary hearings on a desegregation plan since the summer of 1968, the record of the extensive hearing that

summer and in previous years fully documents the various techniques used by the school board to racially segregate Mobile's schools.[25]

Prior to the initiation of this litigation in 1963 the Mobile School Board had no need for the great variety of assignment techniques subsequently used to maintain segregated schools simply because segregation was easily achieved through the maintenance of dual attendance zones, one for whites and the other for blacks. Since 1963 the school board has achieved the same result (1) by establishing racially defined attendance zones, increasing or decreasing the capacity of schools or the grades served by schools to commensurately increase or decrease the areas served by schools in accordance with the racial character of residential patterns, and closing or constructing schools to serve predetermined racial groups, and (2) by providing procedures for optional assignments to assure that those few students who were "unavoidably" assigned to schools serving a different race would continue to attend the schools serving their race.

An examination of these assignment techniques overwhelmingly demonstrates that Mobile's passing acknowledgements of a "neighborhood school concept" have never in reality governed the way in which children are assigned

[25] The first hearings in this litigation were held in 1963 and are incorporated in the record before the Court of Appeals in No. 20,657 (333 F.2d 356). The next hearings were held in 1965 and are reproduced in the record before the Court of Appeals in No. 22,759 (364 F.2d 896). Hearings held during 1967 and 1968 are reproduced in a combined record before the Court of Appeals in No. 26,886 (393 F.2d 690 and 414 F.2d 609). Additional 1968 hearings limited to school construction problems are reproduced in the record before the Court of Appeals in Nos. 27,491—27,260 (414 F.2d 609). The record in this Court includes the records in each of these former proceedings in the Court of Appeals except the 1963 case No. 20,657.

to schools. To be sure, the rhetoric of neighborhood schools has periodically appeared in this litigation. However, the meaning of the neighborhood school as an organizing device has never been clear. In 1965, the Associate Superintendent of Schools, James A. McPherson, in response to a motion by petitioners stated that while the board "considers the neighborhood elementary school . . . to be the desirable organizational pattern where it is practicable to achieve . . . the neighborhood school should not be misconstrued to necessarily mean the school nearest a pupil's residence" (R. 22,759, pp. 25-26).[26] Instead, as conceived by the school board, neighborhoods are the product of not only physical but also sociological factors.

> There are many factors that determine a natural neighborhood. These include natural and physical barriers, for example, traffic thoroughfares, railroads and drainage canals, housing developments; and neighborhood agencies and institutions such as churches, playgrounds, etc.; all of which tend to promote cohesiveness between and among families (Ibid.)

But three years later, Cranford Burns, Mobile's Superintendent of Schools, testified that the school board had not instructed personnel in charge of establishing atten-

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[26] The school board had stated at the outset of this litigation its opposition to any rule requiring the assignment of students on the basis of proximity to schools or by free choice. In its first plan submitted pursuant to an order of the district court in 1963 the board stated:

> D. The Board considers that any general or arbitrary reassignment of pupils presently in attendance at the 89 existing schools, according to any rigid rule of proximity to schools or solely by request on the part of the parents of pupils, would be impractical and a disservice to the system. . . . (R. 22,759, p. 2).

dance zones how to define neighborhoods. Further when asked:

> Q. Is there a workable definition or a standard definition which the school board has used to define neighborhoods as such?

Superintendent Burns responded:

> A. Not unless it would be something very informal indeed that neighborhoods—We look upon neighborhoods in two different ways. You can create a neighborhood on a map in terms of geographic and natural barriers and that, but it's mighty, mighty, hard to identify a neighborhood sociologically and otherwise because that has to do with factors not fully understood and involves information we do not always have at our command, plus the fact that neighborhoods are constantly changing both psychologically and geographically and this makes the problem of organizing the School System very complex indeed (R. 26,886, Vol. IV, pp. 1081-82).

Moreover, no matter what values the Mobile School Board has attributed to the neighborhood school concept it has never been advanced as the determinative basis for student assignment when race has been the issue. Rather than through the abstraction of the "neighborhood school concept" assignments in Mobile have been determined by a combination of decisions concerning attendance zones, grade structures, assignment of portable classrooms, transportation of students, and the closing and construction of schools.[27]

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[27] This portion of the brief is in large part a summary of a longer analysis of these techniques contained in the Brief for the

a. *Attendance Zones.* The most straightforward way in which the school board determines student assignments is through the establishment of attendance zones. On four separate occasions the court of appeals has faulted zone lines established by the school board. In 1966 the court of appeals noted "the school superintendent testified (as was obvious to any who studied neighborhood patterns) that it was 'generally true than the actual make-up of the school district [sometimes called 'area'] tends to conform with the race of the school within that district'." 364 F.2d at 900. In 1968, the court of appeals found the school board's rebuttal "somewhat unpersuasive" to petitioners' charge that racial factors determined zone lines. 393 F.2d at 694, n. 3. Again, in 1969, the court of appeals found "that the attendance zones formulated by the district court are constitutionally insufficient and unacceptable. . . ." 414 F.2d at 610. Zones established by the school board and the district court were again rejected by the court of appeals in the recent proceedings below.

In addition to racially identifiable attendance zones, the splitting of school attendance zone (i.e., non-contiguous zones) has been a common method of school assignment in Mobile. As many as nineteen non-contiguous or split zones were used in one year, 1964-65, including one split zone in which the parts were separated by over 11 miles (Brief Appendix, App. C). This non-contiguous zoning involved both the combination of rural and metropolitan zones as well as two or more non-contiguous zones in metropolitan

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United States in the Court of Appeals, pp. 4-18, and Appendices B, C and D to that brief. The analysis contained in the United States' brief is, in petitioners' view, an accurate and extremely helpful compilation of facts concerning the board's past practices and for this reason is appended to this brief and will hereinafter be cited as Brief Appendix, ——.

Mobile.[28] The board's non-contiguous zoning invariably linked only racially similar areas. Transportation between split zones was provided by the school board (R. 26,886, Vol. I, pp. 5-6).

b. *Transportation.* The use of buses to transport students to school has long been a practice in Mobile. During 1967-68 (the last year for which the record shows these facts) the Mobile School Board used 207 buses to transport 22,094 students daily for an average round trip of 31 miles spending $480,156 or $21.73 per each student transported. (HEW Report, July 10, 1969, p. 61) A summary of the extent to which transportation has been used to facilitate student assignments in Mobile is contained in the following chart prepared by H.E.W.:

[28] Maps illustrating some of the board's non-contiguous zones are included in the Brief Appendix, p. 7a.

CURRENT OPERATIONAL COSTS OF TRANSPORTATION

Year	*Transportation Total Expenditure*	*Enrollment of all Transported*	*Per Transported Pupil Enrolled Per Year*	*Number of Buses*	*Seating Capacity Average*	*Total miles Traveled for Year*	*Length of Round trip in Miles*
1964-65	$405,833	24,972	$16.25	218	59	1,271,585	31
1965-66	414,192	24,101	17.18	203	59	1,209,608	33
1966-67	503,934	22,218	22.68	229	59	1,221,207	32
1967-68	480,156.75	22,094	21.73	207	59	1,188,204	31

Four Year Average Cost Per Transported Pupil Enrolled $19.46

Each New Bus 1st Year $6,648.14—6,948.14

Each Year for Next 8 Years at $1,148.14 plus increases in cost which cannot be calculated

For an average seating capacity of 59, the average operational cost equals $1,148.14

Cost of New Bus $5500—5800
(State Purchase)

TABLE 3-7

H.E.W. Report, July 10, 1969, p. 61:

This extensive use of busing has not been limited to the rural parts of the school system. During 1966-67 the school board bused 7,116 students daily in the metropolitan area. Approximately 2,350 of these students were bused because of non-contiguous zoning (R. 26,886, Vol. I, pp. 5-6). A considerable amount of busing was designed to maintain segregation. As an example, 582 black students were bused over 6 miles from rural Saraland and Satsuma to a black school in metropolitan Mobile to prevent integration at white schools in their communities (*Ibid.*). Similarly, 331 black elementary and junior high school students were transported from the Austin attendance area in the City of Mobile, which was served by a white school, to two black schools, Warren Elementary School and Booker T. Washington Junior High School, also located in the City of Mobile (*Ibid.*).[39]

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[39] In February 1967 the school board considered a proposal to transport students from the Russell Elementary School which the board had closed to the Leinkauf Elementary School, both in the City of Mobile. An assistant superintendent of schools reported to the school board the results of a survey to determine the board's practices in transporting students. His survey reported the use of busing to transport black students away from their "neighborhood" schools:

> "Set forth below is a summary of schools serving elementary children who have to travel at least as far or further than will the pupils formerly attending Russell. . . .
>
> III. Schools where elementary children are now furnished public school bus transportation from out-of-district attendance areas as approved by the Board.
>
> A. Warren-Negro pupils residing in the Austin area.
>
> B. Hillsdale-Negro students residing in the Semmes area.
>
> C. Hall-Negro pupils residing in the Kate Shepard area and Negro pupils residing in the South Brookley area."

(R. 26,886, pp. 24-25).

c. *Portable Classrooms and Grade Structures.* In addition to the way in which zones are established and the transportation of students, the school board has used portable classrooms and the grade structures of schools to relate the capacity of schools to selected racial neighborhoods. For example, the selective assignment of portable classrooms in order to expand the capacity of black schools as a way of avoiding the assignment of black students to under-utilized nearby white schools has been a method of maintaining segregated schools. The most striking examples of this practice have occurred in downtown Mobile. A school board study shows that between 1962 and 1967 residential movements decreased the number of white students attending white downtown schools from 14,128 to 9,897 while the number of black students attending black downtown schools increased from 13,022 to 15,120 (R. 26,886, Vol. VI, pp. 26-27). This led to overcrowded conditions in black schools which the school board responded to by assigning 39 portable classrooms to black schools instead of using 44 available empty classrooms in white schools (*id.* at 29).

Besides effecting the racial composition of schools through the selective assignment of portables or non-utilization of vacant classrooms, the Mobile School Board has also determined the grade structures of numbers of schools in order to effect the racial composition of these schools.

The Mobile school system has used an extraordinarily wide variety of grade structures, including schools serving grades 1-5, 1-6, 1-7, 1-8, 1-9, 1-12, 2-5, 6-7, 6-8, 6-9, 6-10, 6-12, 7, 7-8, 7-9, 7-11, 7-12, 8-12, 9-12, 10-11, 10-12. A school which serves a small number of grades may house more students in each grade than the same school serving a large number of grades. Consequently, the smaller the number

of grades served, the larger the attendance area served by the school may be. By selectively decreasing or increasing the number of grades served at particular schools, the school board has increased or decreased the area served by the school to coincide with racial residential patterns (R. 26,886, Vol. V, pp. 1527-1534). For example, the school board established the Hillsdale School as the only metropolitan school serving grades 1-12 in order to restrict its attendance area to a small black community in the western part of the metropolitan area. School segregation was also the objective in arranging grade structures at four white schools surrounding a black school in northern metropolitan Mobile to enable white students to attend one white school for grade 6, a second for grades 7 and 8, a third for grade 9, and a fourth for grade 10, all in order to prevent their attendance at a nearby black school (R. 26,886, Vol. IV, pp. 1331-32). An expert witness for petitioners, Dr. Myron Lieberman, a Professor of Education at Rhode Island College, testified without contradiction that he had never encountered a school system with as many deviations in grade structures as Mobile and that, while not questioning the necessity for deviations in grade structures, the problem in Mobile is "that the deviations always seem to result in more segregation, not less" (R. 26,886, Vol. V, pp. 1526-32).

d. *Classroom Additions, Construction, Closings, and Conversions.* The Mobile School Board has not always been able to determine the racial composition of schools by the establishment of zone lines, transportation of students, reassignment of portables, and reorganization of grade structures. The task of maintaining school segregation has often involved more permanent decisions concerning construction of both new schools and additional classrooms to existing schools, the closing of some white schools to

avoid integration, and the conversion of other white schools to black schools.

The use of construction programs to perpetuate segregation is perhaps best illustrated by the board's response to the change in racial residential patterns in downtown Mobile which resulted in underutilization of white schools and the overcrowding of black schools. The board's short term response was the assignment of portable classrooms to black schools. Its long term solution was the construction of four new black schools and additions to a fifth existing black school in order to "relieve 35 of the 39 portables now in use in the formerly Negro schools of this area" (R. 26,886, Vol. VI, pp. 29-30). More generally, the board's procedures in determining the need for new schools, both in terms of location and size, have been based on the assumption that new schools will only serve predetermined racial groups (Brief Appendix, pp. 13-15).

The school board's use of its construction program to perpetuate segregation has received judicial recognition since the outset of this litigation. In 1963, when the school board sought to justify to this Court its failure to even begin desegregation by pointing to its ongoing construction of "colored schools," Justice Black's opinion in chambers observed:

> Yet this record fails to show that the Mobile Board has made a single move of any kind looking toward a constitutional public school system. Instead, the Board in this case has rested on its insistence that continuation of the segregated system is in the best interests of the colored people and that desegregation would "seriously delay and possibly completely stop" the Board's building program "particularly in the improvement of and completion of sufficient colored schools

> which are so urgently needed." In recent years, more than 50% of its building funds, the Board pointed out to the parents and guardians of its colored pupils, had been spent to "build and improve colored schools," and of eleven million dollars that would be spent in 1963, over seven million would be devoted to "colored schools."
>
> . . . .
>
> It is quite apparent from these statements that Mobile County's program for the future of its public school system "lends itself to perpetuation of segregation," . . . *Davis* v. *Board of School Commissioners of Mobile County*, 11 L.ed.2d 26, 28 (1963).

Concern that the school board's construction program is being used to maintain segregation has also led the court of appeals on two occasions to order the suspension of school construction projects. 393 F.2d 690 at 697, and 414 F.2d 609 at 610.

The closing and conversion of schools is a segregation technique used by the school board often in conjunction with its school construction program. In downtown Mobile the school board has persistently sought to close underutilized white schools located close to overcrowded black schools in order to avoid the assignment of black students to these schools (Brief Appendix, p. 16). This has been done at the same time that portable classrooms have been assigned to black schools and proposals advanced to construct new black schools.

On other occasions the school board has converted white schools to black schools rather than close them. One example of this process occurred in the Prichard area of metropolitan Mobile where the board, in order to provide classroom space for black students, converted the Snug

Harbor and Turnerville Elementary Schools to black schools, renaming them as Adams and Palmer after locally prominent blacks, and reassigning white students elsewhere (Brief Appendix, pp. 12a-14a). The explicit racial considerations involved in these decisions are revealed by the school board memorandum set forth in the note below.[39]

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[39] R. 26,886, Vol. VI, p. 36 (Plt. Int. Exh. No. 72):

"May 1, 1963

"MEMO: Dr. Burns

From: Dr. Scarborough

RE: Your memo of April 26—Neece Property in the Snug Harbor area.

"The population in Prichard is fairly well stabilized by now it appears, so far as the total population is concerned. It appears to me that our difficulty lies not in too many or not enough schools, but in the matter in having the schools adjusted to the Negro or white population. With the addition of this new Prichard building for the Negroes, north of Carver Road, and the use of Snug Harbor and Turnerville School for Negro schools that for some time this would meet the needs of the population of the Negroes from Telegraph Road to St. Stephens Road and from the Prichard City Limits northward to Highway I-65.

"If the Board is to go along with permanent use of Snug Harbor and Turnerville for housing Negro children and by the building of the new Prichard Elementary School, north of Carver, I think you can see that they are fairly well housed. It is my opinion that if more Negroes move in that area we again would have to abandon another white school and that it in turn could house the increase of Negroes in a school between Craft Highway and Telegraph Road in the vicinity of Happy Hill. This would be a desirable substitution for Snug Harbor in that they would not have to cross the Craft traffic lane, but to make this exchange would cost the Board approximately one half of a million dollars. It is my opinion that they will want to forego crossing Craft Highway and continue with the present facility at Snug Harbor in order to save this one half million dollars in buildings.

"It might be worth consideration if the people, who resist our turning Snug Harbor into a Negro school, could find a way to make that property worth as much as a half of a million dol-

Summary of Argument

I.

The issue presented is what are the requirements of a final school desegregation plan that satisfies the requirements of *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Petitioners believe that nothing less than total desegregation will suffice. But the Fifth Circuit and the Fourth Circuit are accepting the idea that some "reasonable" degree of desegregation satisfies the Constitution. We believe that this is incorrect. *Brown* decided that it was the individual constitutional right of each and every black child to have an education free of racial segregation. No black child should be assigned to a "black school"—that is one identified as the repository of minority children. The focus through the years since *Brown* on effecting a gradual transition to non-discriminatory systems has led the courts below into dealing with desegregation in a manner that now distorts the final objective by forever denying a desegregated education to large numbers of black children.

The goal required by the Constitution is that: every black child, at every grade in his educational career, must be free of assignment to a "black"—a racially identified

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lars. In such cases it might be worth the Board's consideration to abandon the use of Snug Harbor School and making use of the Neece property that we looked at. As I see it, these are the only reasons for our making use of the Neece property of which we looked.

"Naturally if we had the Neece property and an 18 room building with modern facilities, it would be much more valuable than our present Snug Harbor assignment, but it would house no more children. As an investment it might be wise, but in the matter of housing our children at the least possible cost to the citizens, it looks as if Snug Harbor is our best bet.

C. L. Scarborough"

minority—school. Racially identified minority schools are those which by reason of a very considerable racial concentration or disproportion are conceived as designed to receive black children.

II.

The Fifth Circuit's "neighborhood school concept" first, announced in *Ellis* v. *Board of Public Instruction of Orange County, Fla.*, 423 F.2d 203 (5th Cir. 1970), and later developed and applied in more than a score of cases during 1970 including the opinion below, is unworkable, undesirable and unconstitutional. The doctrine is not defended or defensible as non-racial or as affording a neutral basis for assignment. The doctrine does not reflect past school board policy. It was invented by the Fifth Circuit. The Fifth Circuit "neighborhood school concept" requires a balancing of a set of values labeled "neighborhood" against the value of total integration. The policy is unclear, and it involves complicated judgmental appraisals with differing results when applied by different judges.

Mobile has never had any neighborhood school assignment policy. Assignments have been based on a multitude of methods designed to further racial segregation including the use of busing to promote segregation. The Fifth Circuit principle as applied in the decision below leaves a full half of the black elementary children in metropolitan Mobile (where most of the blacks in the county reside) in schools which are all-black or virtually all-black.

III.

The Fourth Circuit is applying parallel doctrine of "reasonableness" which even more explicitly acknowledges that complete desegregation is not required. The concept is not based on an appraisal of the *workability* (Mr. Jus-

tice Harlan, concurring in *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290, 292) of desegregation plans. Nevertheless at least in the Charlotte case the Fourth Circuit is requiring more integration than the Fifth. The contrast is striking. By a vote of 5-1 the Fourth Circuit in Charlotte rejected the school board's elementary plan on the ground that it left half of the black elementary school children in all-black schools. The opinion below in Mobile orders a plan which leaves half of the black elementary school children in all-black schools.

IV.

This Court should declare that every black child is to be free from assignment to a "black" school—an identifiable racial minority school—at every grade of his education. The only excuse from this general principle should be the case of *absolute unworkability* of any proposal for eliminating the racially identifiable black schools. Our concept of absolute unworkability refers to really extreme demographic or geographic flukes far beyond the range of concerns evidenced by recent Fifth Circuit decisions leaving all-black schools in most systems.

The general principle should not be relaxed on the basis of transportation inconveniences and costs, rigid theories of desired grade structures, neighborhood associational values, or fears of sending children to "strange or hostile" neighborhoods. When these rationalizations for continuing segregation are properly examined (particularly in the context of the practices in Mobile) they are all insufficient to justify failure to eliminate state imposed racial segregation. Mobile schools can be fully integrated merely by using the administrative techniques which have long been used in Mobile to keep schools separate.

We believe that the principles we urge will be easier to administer than those now employed by the lower courts.

They have the advantages of simplicity, uniformity, flexibility, and accomplishment of the objectives of the Constitution as construed in *Brown I*. The Constitutional goal of eliminating racially identifiable minority schools in dual systems is within the capacity of this nation to achieve. The promise of *Brown* is broken by the current approach of the courts below.

V.

Final school desegregation plans should not be approved without evidentiary hearings. The district court in this case failed to follow fundamentals of procedural fairness. We do not complain of mere isolated events or of irregularities caused by the need for speedy disposition of a difficult and complicated case. This record shows a consistent pattern of denial of hearings, and a repetitious pattern of deciding important issues based on the school board's *ex parte* factual submissions to the district court. This consistent course of conduct denied the fundamentals of due process: the right to be heard and to have the case decided on evidence introduced in court. *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937); *Morgan* v. *United States*, 298 U.S. 468 (1936); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

ARGUMENT

I.

Introduction

This case presents a fundamental question with respect to the meaning and validity of this Court's historic decision rendered over sixteen years ago in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*). The issue presented is: What are the requirements of a final school desegregation plan: one that finally fulfills the commands of *Brown I* by vouchsafing to all black school children their rights to a desegregated education. Since 1955 when the Court announced in *Brown II* (*Brown* v. *Board of Education*, 349 U.S. 294 (1955)) that more time might be allowed to effect a transition to racially non-discriminatory school systems, and increasingly in recent terms (see, e.g., *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968); *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970); *Northcross* v. *Board of Education*, 397 U.S. 232 (1970)) this Court's school desegregation decisions have been concerned with the question, *how soon?* The Court has finally answered that question. The answer is, now.[31] The remaining question is, *how much*—that is, how much desegregation must occur before a school district has finally satisfied the requirements of *Brown I*. The answer will determine whether the promise of *Brown* will be kept or broken for countless black children.

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[31] "Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969).

One would have supposed that the answer to that question was plain from *Brown I* itself; nothing less than total desegregation will suffice.[32] But this is not the answer that the Court of Appeals for the Fifth Circuit has accepted in this case, nor in other recent school desegregation decisions, nor is it the answer of the Court of Appeals for the Fourth Circuit in *Swann* v. *Charlotte-Mecklenburg Board of Education*, —— F.2d —— (May 26, 1970), certiorari granted, 399 U.S. 926 (1970). Both the Fourth and Fifth Circuits, by differing formulations which amount to the same thing in the end, have accepted the notion that a "reasonable" degree of desegregation discharges the obligation of *Brown I*—with the result that now, at the end of the road of desegregation, as a final fulfillment of the promise of *Brown I*, thousands upon thousands of southern black school children are to be permitted to remain in "black" schools. In the recent Fifth Circuit decisions, frequently as many as one-fifth or one-fourth of the black school population of a district is required to remain in all-black or virtually all-black schools and, doubtless, the effect of *Swann, supra*, will be much the same in the Fourth Circuit.

This remaining segregation is not the result of a shirking of desegregation efforts by the Fifth Circuit (or the Fourth). To the contrary, the Fifth Circuit has worked tirelessly to desegregate the schools, and has afforded review of a large number of school cases at a greatly accelerated pace since this Court's decision in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969).

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[32] "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954).

Nor is the continuing segregation the result of failures in the details of specific desegregation plans which the courts in both circuits—particularly the Fifth—have worked to hammer out in painstaking detail. Rather, the breaking of the promise of *Brown I* to perhaps 20 or 25 percent or more of southern black school children is the result of a mistake of basic principle which, paradoxically, seems to arise precisely from the long desegregation efforts of both circuits. Even more than this Court, the Courts of Appeals of the Fourth and Fifth Circuits have been long and continuously concerned with *how soon,* and with how to speed the process of desegregation. In this concentration upon means—and particularly the means of interim adjustment—the Fourth and Fifth Circuits have developed principles and outlooks which, while quite serviceable during the period of transition envisaged by *Brown II,* distort the ultimate end which it was the purpose of that transition to attain.

What we mean is this: *Brown I* decided that it was the right—the individual and particular right—of every black school child to have an educational experience free of the demeaning and damaging effects of racial segregation. It was the right of each not to be compelled to attend a "black" school—that is, one identified as the repository of black children because they were black. *Brown II* recognized that the creation of school systems which would fulfill this right could not be instantaneously achieved, and it ushered in a period of adjustment during which it was quite candidly recognized that some black children would be denied this right while changes in the system were made, looking to a time when all should have realization of the right. The adjustment took—and perhaps had to take—a number of forms. Black children were denied an integrated education in 1955 and 1960 which it was recognized that

identically situated black children would be getting in 1965 and 1970.[33] Black children were denied an integrated education for six years—throughout grammar school—which it was planned that those same black children would get for three years—in junior high or high school.[34] Black children in some schools were denied an integrated education under a comprehensive school plan which gave an integrated education to other black children in other schools.[35] True to *Brown I*, it could not be said that any of these children were receiving the desegregated education to which they were constitutionally entitled: But the denial to them of a constitutional, desegregated education was accepted as a part of the process of transition, while the focus of attention was upon the development of school *systems* that could eventually give all black children their constitutional rights.

Concentration on desegregation of *systems* was necessary during the transitional period, and it remains neces-

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[33] See, for example, the approval of stair-step grade-a-year desegregation plans as in Mobile in 1963. *Davis* v. *Board of School Commissioners of Mobile County*, 322 F.2d 356, 359-360 (1963) (14a).

[34] Thus, for example, in 1966 the Fifth Circuit described Mobile's plan: "The plan was to have application in the school year 1963-64 to the twelfth grade in the city of Mobile only, in the school year 1964-65 it was to have application to the eleventh and twelfth grades in all schools in Mobile County and to the first and tenth grades in the city of Mobile schools. In 1965-66 it was to have application to grades one, two, nine, ten, eleven and twelve of all schools of Mobile County. In 1966-67, grades three and eight were to be added, in 1967-68, grades four and seven were to be added, in 1968-69, grade five was to be added, and in 1969-70 it became applicable to grade six." (*Davis* v. *Board of School Commissioners of Mobile Cty.*, 364 F.2d 896, 900 (1966) (67a). The court later ordered that all grades be desegregated by September 1967 (374 F.2d at 904).

[35] See, for example, the Fifth Circuit order allowing the district judge in the Mobile case to defer the start of desegregation in rural Mobile schools for a year after it was to begin in the city of Mobile. *Davis* v. *Board of School Commissioners of Mobile County*, 322 F.2d 356, 359 (1963) (14a).

sary in the sense that the end result of the transition must be school systems that provide the opportunity for desegregated education. But concentration upon systems cannot be permitted to obscure the ultimate goal which is the vindication of every black child's right to a desegregated education. This right—recognized by *Brown I*—is not simply to be educated within a system in which some other black children, even a majority of black children, are given a desegregated education. It is a right of each and every black child to have a desegregated education himself. (And it is not a right to merely 3 or 6 years of desegregated education, but to a complete—twelve year—desegregated education.) So the necessary feature of a final school desegregation plan, one that ends the transitional period and fulfills the promise and command of *Brown*, is that every black child receive an education during no part of which he is assigned to a "black" school—a school identifiable as a school for blacks. *Brown* requires the end of the racially identifiable minority schools—the schools which by reason of a very considerable racial concentration or disproportion are conceived as designed to receive black children. The final Fifth Circuit plans, as exemplified by its Mobile decision below, and the final Fourth Circuit plans envisaged by the Charlotte-Mecklenburg decision (*Swann, supra*), which leave large numbers of black children in identifiable "black" schools, simply do not satisfy this ultimate goal. What has happened is that the Fourth and Fifth Circuits have permitted the thinking of the transitional period—that some black children might be denied their rights for a time—to carry over and define the ultimate goal of the transition, as a measure of finally satisfactory desegregation, so that it is now accepted that "desegregation" is satisfactory which will *forever* deny twenty to twenty-five percent of black children (or even more) a desegregated education.

We deal below with the doctrines that have led to this result. But what is required in these cases is that this Court set right, once and for all, the ultimate matter of principle, of the goal which every desegregation plan must achieve (and under *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969), and *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970), must achieve *now*). That goal is: that *every* black child, at *every* grade in his educational career, must be free of assignment to a "black"—a racially identified minority—school. If and when this Court announces that principle clearly, we are sure that the Fourth and Fifth Circuits will find it no more difficult to administer—and in many ways easier to administer—than the principles which they are now administering, which call for most—some uncertain number less than all—black children to realize their constitutional rights.

II.

The Fifth Circuit's Approach to Final School Desegregation Plans Since Alexander and Carter.

A. *Ellis* v. *Board of Public Instruction of Orange County*: Announcement of the "Neighborhood School" Concept.

On February 17, 1970, shortly after this Court's decisions in *Alexander*[36] and *Carter*,[37] the Fifth Circuit announced for the first time[38] that it would require application of a

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[36] *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969).

[37] *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970).

[38] Before *Alexander*, the Fifth Circuit had been engaged in deciding a number of cases involving the adequacy or inadequacy of freedom of choice plans under this Court's decisions in *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1963); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968); and

"neighborhood school" concept in final desegregation plans. This announcement came in a decision by Judge Bell in *Ellis* v. *Board of Public Instruction of Orange County, Fla.*, 423 F.2d 203 (5th Cir. 1970). In the *Orange County* case (*Ellis, supra*) the Fifth Circuit found that the board's geographic zoning plan left 51% of the black students in eleven all-black schools. The board said it wished to maintain a neighborhood basis of assignment but the Fifth Circuit found "variances . . . from the neighborhood school assignment system with the result that some white students are attending schools located greater distances from their home than nearby schools where the student body is all

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Raney v. *Board of Education*, 391 U.S. 443 (1968). See, e.g., *Adams* v. *Mathews*, 403 F.2d 181 (5th Cir. 1968); *Hall* v. *St. Helena Parish School Board*, 417 F.2d 801 (5th Cir. 1969), cert. denied, 396 U.S. 904 (1969); *United States* v. *Hinds County School Bd.*, 417 F.2d 852 (5th Cir. 1969), reversed as to delay granted *sub nom. Alexander, supra*. In *Adams* v. *Mathews, supra*, at 189, the Fifth Circuit announced that plans leaving all-Negro schools were unsatisfactory.

> "If in a school district there are still all-Negro schools or only a small fraction of Negroes in white schools, or no substantial integration of faculties and school activities then, as a matter of law, the existing plan fails to meet constitutional standards as established in *Green*.

This language was reiterated in *Henry* v. *Clarksdale Municipal Separate School Dist.*, 409 F.2d 682, 689 (5th Cir. 1969).

The Fifth Circuit held in several cases that geographic zoning plans for desegregation could be accepted only if they actually worked to desegregate the schools—they were to be judged by the same principle applied to free choice plans. See, e.g., *United States* v. *Greenwood Municipal Separate School Dist.*, 406 F.2d 1086 (5th Cir. 1968), cert. denied, 395 U.S. 907 (1969); *Henry* v. *Clarksdale Municipal Separate School Dist.*, 409 F.2d 682 (5th Cir. 1969), cert. denied, 396 U.S. 940 (1969); *United States* v. *Indianola Municipal Separate School Dist.*, 410 F.2d 626 (5th Cir. 1969), cert. denied, 396 U.S. 1011 (1970). The same rule was applied in an earlier appeal in the Mobile County cases holding that the board zones failed to achieve sufficient desegregation. *Davis* v. *Board of School Commissioners of Mobile County*, 414 F.2d 609 (5th Cir. 1969).

Negro" (423 F.2d at 207). The Fifth Circuit decided "this cannot be permitted in a school system operated on a neighborhood basis" (*ibid.*) and required that the board adopt what the Fifth Circuit called "a true neighborhood assignment system, assigning students to the school nearest the student's home up to the capacity of the given school" (*ibid.*).

The *Ellis* decision ordered a plan based on zone lines equidistant between schools, but limited by the existing capacity of schools, and also leaving to the board the decision whether "to expand present facilities" (*ibid.*). The court said that the principle must be applied "without exception" and without "variances":

> We also hold that the neighborhood system, based on school capacity, must be observed without exception. This will prevent any variance based on traffic conditions, such as are disclosed in the supplemental findings of fact with respect to 53 students who should go to Callahan school, or by zone line locations as is the case with five children who should be assigned to the Webster Avenue school. Variances by arbitrary zone lines, or for reasons of traffic, while reasonable on their face, may destroy the integrity and the stability of the entire assignment plan. If Orange County wishes to maintain a neighborhood assignment system, then it must do so without variances. Each student in the system must be assigned to attend the school nearest his or her home, limited only by the capacity of the school, and then to the next nearest school. (*Ellis, supra,* 423 F.2d 203, 207-208.)

Applying this Fifth Circuit no-variances "neighborhood" principle to the Orange County system—which had 68,012 white pupils (82%) and 14,856 blacks (18%)—left three all-black schools which would serve 2,397 black elementary

students (27% of black elementary pupils and 16% of all black pupils). The Fifth Circuit's neighborhood plan left these 2,397 black pupils in all-black schools because—the court said—their segregation resulted from residential patterns. The court concluded that student desegregation "will be accomplished once the district court requires and ascertains as a fact that the neighborhood student assignment system, based on the definition herein contained is invoked and the transfers made necessary thereby have been made" (423 F.2d at 208).

B. *Analysis of the "Neighborhood School" Concept, Fifth Circuit Style.*

Analysis of the "neighborhood school" concept—Fifth Circuit style—requires a consideration of the host of decisions in which the concept has been applied since *Orange County, supra.*[39] A number of characteristics of the

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[39] There have been several dozen Fifth Circuit school desegregation decisions during 1970 to date. The following is a selective listing of cases since *Orange County* which deal with the "neighborhood school" concept.

1. *Andrews* v. *City of Monroe,* 425 F.2d 1017 (5th Cir. 1970)
2. *Singleton* v. *Jackson Municipal Separate School Dist.,* 426 F.2d 1364 (5th Cir. 1970)
3. *Mannings* v. *Board of Public Instruction of Hillsborough County,* 427 F.2d 874 (5th Cir. 1970)
4. *Harvest* v. *Board of Public Instruction of Manatee County,* No. 29425 (5th Cir., June 26, 1970)
5. *Carr* v. *Montgomery County Board of Education,* No. 29521 (5th Cir., June 29, 1970)
6. *Bradley* v. *Board of Public Instruction of Pinellas County,* No. 28639 (5th Cir., July 1, 1970), new opinion substituted on rehearing (July 28, 1970)
7. *Hightower* v. *West,* No. 29993 (5th Cir., July 14, 1970)
8. *Lee* v. *Macon County Board of Education,* No. 29584 (5th Cir., July 15, 1970)
9. *Tillman* v. *Board of Public Instruction of Volusia County,* No. 29180 (5th Cir., July 21, 1970)

"neighborhood" concept have unfolded as it has been applied to a variety of factual contexts by different panels of the Fifth Circuit:

First, the Fifth Circuit concept is not a doctrine which asserts that strict geographic zoning, in the context of these school systems, is "non-racial." This is admitted by the Fifth Circuit in the *Orange County* and *Mannings* cases and is the holding of a number of the recent Fifth Circuit decisions (*Andrews* v. *City of Monroe; Henry* v. *Clarksdale Municipal Separate School Dist.; Ross* v. *Eckels,* all cited in note 39, *supra*). As recognized also by both courts below in *Swann* v. *Charlotte-Mecklenburg Board of Education,* Oct. Term, 1970, No. 281, the "neighborhood" assignment is not non-racial, because the very school neighborhoods in question were created by state action to achieve school segregation. On the one hand housing, zoning, public housing, urban renewal and construction, and racial discrimina-

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10. *Youngblood* v. *Board of Public Instruction of Bay County,* No. 29369 (5th Cir., July 24, 1970)
11. *Wright* v. *Board of Public Instruction of Alachua County,* No. 29999 (5th Cir., Aug. 4, 1970)
12. *Singleton* v. *Jackson Municipal Separate School Dist.,* No. 29226 (5th Cir., Aug. 12, 1970)
13. *Pate* v. *Dade County School Board,* Nos. 29039 and 29179 (5th Cir., Aug. 12, 1970)
14. *Henry* v. *Clarksdale Municipal Separate School Dist.,* No. 29165 (5th Cir., Aug. 12, 1970)
15. *Allen* v. *Board of Public Instruction of Broward County,* No. 30032 (5th Cir., Aug. 18, 1970)
16. *Valley* v. *Rapides Parish School Board,* No. 30099 (5th Cir., Aug. 25, 1970)
17. *Conley* v. *Lake Charles School Board,* No. 30100 (5th Cir., Aug. 25, 1970)
18. *Ross* v. *Eckels,* No. 30080 (5th Cir., Aug. 25, 1970)
19. *Brown* v. *Board of Education of City of Bessemer,* No. 29209 (5th Cir., Aug. 28, 1970)
20. *Robertson* v. *Natchitoches Parish School Board,* No. 30031 (5th Cir., Aug. 31, 1970)

tion in housing, and on the other hand, school board decisions relating to school site selection, the determination of building sizes and capacities (including use of portable classrooms), grade structures, optional zones, non-contiguous zones, and bussing were all adjusted to create neighborhoods of convenience with the structure of the legally established dual school systems. To stop calling the system dual but assign pupils along the lines of convenience thus established is merely to permit the maintenance of identical—indeed, continuation of the same—segregation patterns under a different name. As Judge Wisdom observed in *Henry* v. *Clarksdale Municipal Separate School Dist.*, 409 F.2d 682, 689 (5th Cir. 1969):

> A school board's zoning policy may appear to be neutral but in fact tend to retard desegregation because it binds pupils to custom-segregated neighborhoods. In this situation, the board's failure to take corrective action amounts to the State's giving official sanction to continued school segregation, contrary to the mandate of this Court and of the Supreme Court.

And the court held, in the same *Clarksdale case* (409 F.2d at 683):

> As this case demonstrates, a school board's adoption of a geographic zoning system instead of a "freedom of choice" system is not a guarantee of effective desegregation. "Geographic zoning, like any other attendance plan adopted by a school board in this circuit, is acceptable only if it tends to disestablish rather than reinforce the dual system of segregated schools." *United States* v. *Greenwood Municipal Separate School District*, 5 Cir. 1968, 406 F.2d 1086.

The Fifth Circuit has simply made a determination to permit some *values*, generally expressed under the rubric

of "neighborhood school concept," to prevail over the recognized conflicting values and goals of a fully integrated school system (i.e., one in which *no* black child is *ever* assigned to a black school). For the Fifth Circuit holds that "neighborhood" assignment is *not* non-racial (see *Henry* v. *Clarksdale Municipal Separate School Dist.*, No. 29165 (5th Cir., Aug. 12, 1970); *Ross* v. *Eckels*, No. 30080 (5th Cir., Aug. 25, 1970); and the treatment of Toulminville school in the opinion below in Mobile). It holds that "black" schools must be disestablished "where reasonable alternatives exist," *Allen* v. *Board of Public Instruction of Broward County*, No. 30032 (5th Cir., Aug. 18, 1970);[40] and the "neighborhood school concept" is simply a verbal formula for indicting some alternatives as "unreasonable" where they involve "impracticable attendance zones or inordinate transportation problems," *Bradley* v. *Board of Public Instruction of Pinellas County*, No. 28639 (5th Cir., July 28, 1970) (new opinion on rehearing).

Second, the "neighborhood school concept" so used is not a description of any policy actually adopted in the past, or even used in the present, by any of the school boards. It is

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[40] Slip opinion, p. 10 (footnotes omitted) (per Judge Goldberg):

> In the conversion from dual school systems based on race to unitary school systems, the continued existence of all-black or virtually all-black schools is unacceptable where reasonable alternatives exist. And it is clear that one acceptable way to achieve reasonable alternatives is by pairing schools. The tenor of our decisions is unmistakable: where all-black or virtually all-black schools remain under a zoning plan, but it is practicable to desegregate some or all of the black schools by using the tool of pairing, the tool must be used. Thus we have required the pairing or clustering of schools in Dade County, Florida, in Pinellas County, Florida, in Hillsborough County, Florida, in Alachua County, Florida, in Clarksdale, Mississippi, and in Jackson, Mississippi, to mention only a few instances. It is now clear beyond peradventure that the tool of school pairing—a most viable tool in the school desegregation process—must be embraced where it is practicable and desegregation cannot be achieved by other means.

invoked (as in *Davis*, the opinion below) where the school board has never used a true "neighborhood school" system; and (as in *Mannings*[41] and *Davis*) where it does not now use a true "neighborhood school" system as defined in the *Orange County* case (*Ellis, supra*). This indicates both (a) that the Fifth Circuit is not accommodating local educational policy, but is inventing its own;[42] and (b) that the nature of the policy is to prefer certain values, labeled "neighborhood" to the value of the total integration.

Third, the "neighborhood school concept" so used is unworkable, undesirable, and unconstitutional:

(a) The concept is inherently unclear. "Neighborhood" means any one of a number of different pupil-assignment systems. For example, in *Ellis (Orange County), supra*, it means strict equidistant zoning based on school capacity. In *Mannings (Hillsborough County), supra*, it means either a strict *Ellis* neighborhood plan or pairing of schools for high schools, a requirement that schools be "paired on a neighborhood basis" for junior highs, and for elementary schools some zoned by what the court calls variously "discretionary" or "arbitrary" zone lines, with other schools required to be paired "without departing from neighborhood concepts." In *Davis* (the opinion below), it means

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[41] *Mannings* v. *Board of Public Instruction of Hillsborough County*, 427 F.2d 874 (5th Cir. 1970).

[42] The *Orange County* decision indicates very explicitly that the Fifth Circuit is creating its own definition of "neighborhood school policy":

> It was not clear from the opinion and findings of the district court that the defendants were in fact maintaining a neighborhood school system *as we would define such a system*. A neighborhood school system cannot be a system where variances are allowed to permit children a choice of not attending the nearest school to his or her residence and thereby avoiding assignment to a formerly Negro or formerly white school as the case may be." (*Ellis, supra*, 423 F.2d 203, 206) (emphasis added).

use of arbitrary zone lines in a Justice Department plan for pairing schools and recasting grade structures within a generalized "neighborhood concept." In *Ross* v. *Eckels (Houston, Texas), supra,* it means rejecting the trial judge's strict *Orange County* type plan based on equidistant capacity zoning in favor of the school board's discretionary zones for secondary schools (to get more desegregation) and court-ordered pairing of contiguous school zones for a number of elementary schools, with the pairings described only as "well within any reasonable definition of a neighborhood school system."

(b) It inevitably involves judgmental appraisals, without a consistent goal or measure, as to how far "neighborhood" considerations may weigh against the goal of total desegregation. It therefore leads to conflicting decisions by different Fifth Circuit panels (compare *Clarksdale* and *Houston* with *Orange County* and *Fulton County*),[43] and still more conflict in the decisions of differing district judges. This is inevitable because the only principle of decision is that "neighborhood" considerations are somehow to be "balanced" against considerations of eliminating the all-black schools. The weights to be assigned in balancing are left to the balancing judge.

(c) Its common result (except where geographic fortuity makes "neighborhood" considerations essentially insignificant (as in *Broward County*))[44] is to leave a significant

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[43] *Henry* v. *Clarksdale Municipal Separate School Dist.*, No. 29165 (5th Cir., Aug. 12, 1970); *Ross* v. *Eckels*, No. 30080 (5th Cir., Aug. 25, 1970); *Ellis* v. *Board of Public Instruction of Orange County*, 423 F.2d 203 (5th Cir. 1970); *Hightower* v. *West*, No. 29993 (5th Cir., July 14, 1970).

[44] *Allen* v. *Board of Public Instruction of Broward County*, No. 30032 (5th Cir., Aug. 18, 1970). The Fifth Circuit applied the pairing technique to desegregate each one of 13 schools left all-black or virtually all-black by the board's discretionary zone lines.

number of "black" schools—usually 20 or 25% of the black school population and a much larger percent of the black elementary school population. This is the ultimate evil and deficiency of the Fifth Circuit "neighborhood school concept": it simply denies the rights vouchsafed by *Brown I* to 20 to 25% of black children—or even more—forever.

C. *Application of the Fifth Circuit Approach in Mobile—the Opinion Below.*

Mobile has never had "neighborhood schools." All of the values which are supposedly embodied in the "neighborhood school concept" have consistently been subordinated by the Mobile School Board to the goal of racial segregation. This is so thoroughly documented in this record as to be virtually incontestable. (See the Statement, *supra*, pp. 27 to 37, and the Appendix to this brief containing the Statement from the Brief of the United States in the Fifth Circuit, *infra*.) In Mobile "neighborhood school" has been only a euphemism for racial separation. In his 1966 opinion in this case Judge Tuttle described the Mobile practice:

> Both in the testimony and in the briefs, much is said by the appellees about the virtues of "neighborhood schools." Of course, in the brief of the Board of Education, the word "neighborhood" doesn't mean what it usually means. When spoken of as a means to require Negro children to continue to attend a Negro school in the vicinity of their homes, it is spoken of as a "neighborhood" school plan. When the plan permits a white child to leave his Negro "neighborhood" to attend a white school in another "neighborhood" it becomes apparent that the "neighborhood" is something else again. As every member of this court knows, there are neighborhoods in the South and in every city of the South which contain both Negro and white

people. So far as has come to the attention of this court, no Board of Education has yet suggested that *every* child be required to attend his "neighborhood school" if the neighborhood school is a Negro school. Every board of education has claimed the right to assign every white child to a school other than the neighborhood school under such circumstances. And yet, when it is suggested that Negro children in Negro neighborhoods be permitted to break out of the segregated pattern of their own race in order to avoid the "inherently unequal" education of "separate educational facilities," the answer too often is that the children should attend their "neighborhood school."

So, too, there is a hollow sound to the superficially appealing statement that school areas are designed by observing safety factors such as highways, railroads, streams, etc. No matter how many such barriers there may be, none of them is so grave as to prevent the white child whose "area" school is Negro from crossing the barrier and enrolling in the nearest white school even though it be several intervening "areas" away. (*Davis* v. *Board of School Comm'rs of Mobile County*, 364 F.2d 896, 901 (5th Cir. 1966) (67a).)

Mobile did not have "neighborhood schools" under its plan during the last school year (1969-70), nor does it have "neighborhood schools" under the Justice Department plan ordered into effect by the Fifth Circuit for the current school year (1970-71). The opinion below states: "Unlike *Orange County (Ellis* v. *Orange County, supra)*, Mobile does not purport to use the strict neighborhood assignment system. It employs zones based on discretionary zone lines." The Justice Department plan promotes desegregation on the basis of arbitrary zones by pairing zones and changing grade structures.

There is nothing in the record in this case which demonstrates that the values involved in "neighborhood schools" amount to anything, or what they amount to. As "neighborhood schools" have never really been tried in Mobile as a policy of the system there is nothing in the Mobile experience which supports such a policy. The fact that the district judge repeatedly denied an evidentiary hearing (see part V, *infra*), masks the fact that the actual costs involved in establishing non-contiguous zones, or in pairing non-contiguous zones, or in providing more transportation are not established on this record. Unlike the record in the Charlotte case (*Swann*), there has never been any opportunity for factual inquiry in this case by which the courts might appraise the costs or the relative convenience of the various proposals to desegregate the system. For example, there is no factual data in the record at all relevant to the policy embodied in the plan approved by the Fifth Circuit of limiting pairings to schools with adjacent zones. Obviously in some instances the transportation required to bus pupils from non-contiguous zones will be no different than the transportation required in busing pupils between contiguous zones. In such circumstances, a policy of not pairing schools with non-contiguous zones does not even have any rational basis. There is no evidence in this record upon which one might make an informed judgment about whether pairing schools in Mobile with non-contiguous zones would require "inordinate transportation requirements." The last phrase was the one used in *Mannings*, where the court gave a particularly opaque explanation of the difference between "pairing on a neighborhood school concept"—which it approved—and the "other" kind of pairing that it disapproved. After noting that the pairings the Fifth Circuit was requiring were between schools which were adjacent and in close proximity, the court said:

> This type of assignment, denominated as pairing, is singularly distinguishable from the grouping of several schools, located in other than a neighborhood area, into one group for assignment purposes in order to manipulate racial balances through inordinate transportation requirements.
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> (*Mannings* v. *Board of Public Instruction of Hillsborough County*, No. 28643 (5th Cir., May 11, 1970), slip opinion, p. 7, note 2.)

Nothing in the record demonstrates that the Fifth Circuit neighborhood school concept has any particular educational or other community value. One must speculate at large about the relative merit of the Fifth Circuit "neighborhood school policy" as it has been applied in the opinion below.

The one thing that is plain about the policy as applied in Mobile is its result in leaving a substantial number of black children in all-black schools. The plan will leave six all-black or virtually all-black schools enrolling 5,351 black pupils. These 5,351 pupils represent 22% of the black pupils in metropolitan Mobile schools and a startling 50% of the black elementary pupils in metropolitan Mobile schools. The stark reality of the plan approved by the court below is that half of all black pupils will—during their elementary school years—attend schools that are all-black, the very schools that *Brown I* held unconstitutional.

III.

The Parallel Doctrine Applied by the Fourth Circuit.

The Fourth Circuit's "resonableness" test announced in *Swann* v. *Charlotte-Mecklenburg Board of Education*, —— F.2d —— (4th Cir. 1970), amounts to a process of weighing the same sorts of "neighborhood" values against total desegregation that the Fifth Circuit has been weighing. However, the Fourth Circuit decision is more explicit that total desegregation is not required, but only a reasonable amount of desegregation:

> . . . not every school in a unitary school system need be integrated; second, nevertheless, school boards must use all reasonable means to integrate the schools in their jurisdiction; and third, if black residential areas are so large that not all schools can be integrated by using reasonable means, school boards must take further steps to assure that pupils are not excluded from integrated schools on the basis of race. (*Swann*, No. 281, O.T. 1970, Appendix p. 1267a.)

The Fourth Circuit's disregard of factual findings of the district court in *Swann* relating to the feasibility of the transportation requirements of the district court desegregation plan highlights that the balancing process being utilized is not an appraisal of the "workability" of the plan (Mr. Justice Harlan, joined by Mr. Justice White, concurring in *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290, 292), but a balancing of values. As Judge Sobeloff expressed it the majority in *Swann* made "no more than an abstract, unexplicated judgment—a conclusion of the majority that, all things considered, desegregation of this school system is not worth the price." (*Swann*, *supra*, No. 281, O.T. 1970, Appendix 1288a). The dissenting opinions of Judges Sobeloff and Winter in *Swann* demonstrate that

there was no conclusion by the majority that the district court's plan was unworkable or not feasible.

At least in the *Swann* case the Fourth Circuit's "reasonableness test" seems to require significantly more desegregation than the Fifth Circuit requires by its "neighborhood school concept." This is strikingly demonstrated by the fact that the Fourth Circuit upheld the trial judge's rejection of the Charlotte-Mecklenburg board's plan because the "board's elementary school proposal . . . left about one-half of both the black and white elementary pupils in schools that were nearly completely segregated." Yet, precisely that result—one-half of the black elementary pupils completely segregated—was approved by the decision of the Fifth Circuit for Mobile.

IV.

The Legal Principles This Court Should Declare.

Petitioners urge that this Court declare the following general principle stating the goal which the courts should require to bring dual systems into compliance with the Constitution: *Every* black child is to be free from assignment to a "black" school—an identifiable racial minority school—at every grade of his education. We would define "identifiable racial minority schools" as those schools which by reason of a very considerable racial concentration or racial disproportion are conceived as designed to receive black children.[45] Our statement of the principle focuses on

[45] In judging concentration and disproportion, we refer to the racial make-up of the school administrative unit, leaving for separate resolution disputes relating to the racial composition of such political or administrative units. See, for example, the problem of a separate black school system located within a white county school system dealt with by the Eighth Circuit in *Haney* v. *County Board of Education of Sevier County, Ark.*, 410 F.2d 920 (8th Cir. 1969); and cf. *Wright* v. *County School Board of Greensville County, Va.*, 309 F. Supp. 671 (E.D. Va. 1970), *appeal pending*.

the black schools because we regard the elimination of racially identifiable "white" schools as an incident—albeit a necessary incident—to desegregation of these minority schools where black children are set apart as a separate caste.[46]

We believe that the only excuse from the general principle stated should be the case of absolute unworkability (cf. the concurring opinion of Mr. Justice Harlan in *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290, 292)[47] of any proposal for eliminating the black schools. The available techniques of desegregation are adequate to cope with most school systems without even approaching the

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[46] Judge Sobeloff has well-stated the significance of *Brown* in a recent decision:

> Certainly *Brown* had to do with the equalization of educational opportunity; but it stands for much more. *Brown* articulated the truth that *Plessy* chose to disregard: that relegation of blacks to separate facilities represents a declaration by the state that they are inferior and not to be associated with. By condemning the practices as "inherently unequal," the Court, at long last expunged the constitutional principle of black inferiority and white supremacy introduced by *Dred Scott*, and ordered the dismantling of the "impassable barrier" upheld by that case. (*Brunson* v. *Board of Trustees of School District No. 1 of Clarendon County, South Carolina*, No. 14,571 (4th Cir., June 5, 1970) (concurring opinion), slip opinion pp. 8-9.)

> Judge Sobeloff also wrote: "Certainly it is hoped that under integration members of each race will benefit from unfettered contact with their peers. But school segregation is forbidden simply because its perpetuation is a living insult to the black children and immeasurably taints the education they receive. This is the precise lesson of Brown." (Id. at p. 11.)

[47] See also the language of Judge Sobeloff in *Swann* v. *Charlotte-Mecklenburg Board of Education*, —— F.2d —— (4th Cir., May 26, 1970) (dissenting opinion):

> Of course it goes without saying that school boards are not obligated to do the impossible. Federal courts do not joust at windmills. Thus it is proper to ask whether a plan is feasible, whether it can be accomplished.

range of real unworkability. We have in this country the available technology to integrate the schools. The concept of absolute unworkability refers only to extreme circumstances of geographical or demographic flukes—such as all-black towns far removed from whites—cases far beyond the range of concerns evidenced in the recent Fifth Circuit opinions leaving all-black schools.

Specifically, a relaxation of the general principle that every black child shall be free from assignment to a "black" school, cannot be justified on the basis of (a) transportation inconveniences and costs, (b) rigid theories about maintenance of grade structures, (c) "neighborhood" associational values such as facilitation of P.T.A. meetings, or (d) concerns that children not be sent to school in a "strange or hostile" neighborhood. We discuss below the inadequacy of each of these concerns as a basis for not achieving total desegregation of dual systems.

Transportation inconveniences and costs do not justify the retention of black schools. As the facts with respect to school busing become known, it is apparent that it is a wide-spread, normal and sensible part of the daily life of 18 million American pupils—forty percent of all school children. The United States Civil Rights Commission has put the busing issue in a fair perspective:

> In his statement, the President raised the issue of busing and cautioned that we must proceed with the least possible disruption to our children's education. Busing has become an emotionally charged word and the issues involved have been the subject of considerable misunderstanding. Many who oppose busing do so on the basis of certain assumptions, one of which is that riding to school disrupts a child's education and causes harm. This is a serious issue which should

not be argued solely in terms of assumptions or emotion. The Commission believes that facts which it has found in the course of its investigations may contribute to clarifying the issue and sharpening the debate over it.

Busing is neither a new nor a unique technique, and its use is not limited to facilitating desegregation. For example, for decades, black and white children, alike, in the South were bused as much as 50 miles or more each day to assure perfect racial segregation. In many cases, busing was the exclusive privilege of white children—black children often were required to walk considerable distances. No complaints then were heard from whites of any harmful effects. Nor was any concern exhibited over the damage suffered by black children through their deliberate segregation. The Supreme Court in *Brown* described vividly the nature of the harm to which Negro children were being subjected.

> "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

Thus the arguments that some now make about the evils of busing would appear less than ingenuous. The plain fact is that every day of every school year 18 million pupils—40 percent of the Nation's public school children—are bused to and from school, and the buses log in the aggregate more than two billion miles—nine billion passenger miles—each year. It also should be understood that the overwhelming majority of school busing has nothing to do with desegregation

or achieving racial balance. The trend toward consolidation of schools, for example, particularly in rural areas, requires extensive busing. It causes no disruption to the educational routines of the children and is treated as normal and sensible.

Amid the controversy over busing, in many school systems, North and South, transportation is being used quietly and effectively as a means of bringing about desegregation. The bus rides are not long—in Berkeley, California, for example, a city of 120,000 people, the bus trip never exceeds 20 minutes—and it causes no harm. In the South, of course, the amount of busing needed to bring about desegregation frequently is considerably less than was required to maintain dual school systems. For example, at the Commission's 1968 hearing in Montgomery, Alabama, we found that black students in Selma, seeking to attend trade school, were bused some 50 miles to the nearly all-black Trenholm School in Montgomery, although the Rufus King trade school was located in Selma. Rufus King, however, was all-white.

It is a mistake to think of the problems of desegregation and the extent that busing is required to facilitate it solely in the context of the Nation's relatively few giant urban centers such as Chicago, New York, Los Angeles. In most of our cities the techniques necessary to accomplish desegregation are relatively simple and busing creates no hardships. The experience in communities which have successfully desegregated could easily be transferred to cities of greater size.

Even in giant urban centers, progress in desegregation does not require interminable bus rides or disruption of our children's education. The President, in discussing the recent California court decision requiring desegregation of the Los Angeles school system, quoted

"local leaders" as estimating that the total cost of busing will amount to 40-million dollars over the next school year. This estimate represented the contention of the defendants in that litigation. It was presented to the court for the purpose of arguing against the feasibility of desegregation in that city's school system. in fact, the court rejected this estimate as unrealistic.

In Los Angeles, as in other cities, substantial desegregation can be accomplished through relatively simple devices such as alteration of existing school attendance areas, school pairing, and the establishment of central schools. To be sure, transportation is necessary in giant urban centers as it is in smaller cities, but here too, it is false and defeatist to assume that the bus rides must be lengthy or that the education of our children will be disrupted.

In the Commission's view, the emphasis that some put on the issue of busing is misplaced. As most Americans would agree, it is the kind of education that awaits our children at the end of the bus rides that is really important.

(Statement of the United States Commission on Civil Rights Concerning the "Statement by the President on Elementary and Secondary School Desegregation", April 12, 1970.)

The fully developed record in the *Swann* case (No. 281, O.T. 1970), shows that furnishing bus transportation costs a relatively small amount of money in the context of the total costs of a school system. The average annual cost of busing in North Carolina is only about $20 per child. The figures on cost in this record indicate that the same thing is true in Mobile and that busing in Mobile also costs something around $20 per child per year (see Statement, *supra*,

p. 31). School busing frequently results in substantial savings in construction and other costs because it enables a system to purchase less expensive suburban land away from concentrated population areas (this is the pattern of new site acquisitions shown in the *Charlotte* case) and enables more complete use to be made of existing facilities notwithstanding population movements in a community.

It is generally recognized throughout the United States that school buses furnish the safest transportation available for school children. Judge McMillan's findings in the *Charlotte* case are based on the national data: "Upon the basis of data furnished by the school board and on the basis of statistics from the National Safety Council, it is found as a fact that travel by school bus is safer than walking or than riding in private vehicles" (Appendix in No. 281, p. 1202a) and "School bus transportation is safer than any other form of transportation for school children" (*Swann, supra,* Memorandum Decision of Aug. 3, 1970, not yet reported).

The widespread use of busing to achieve racial segregation has been completely established on this record in Mobile. The same thing has been shown in the Charlotte record and—as the Civil Rights Commission has reported—it is true in the South generally. The analysis done for the court below by the Department of Justice describing the use of busing to preserve segregation in Mobile in 1965 and 1967 is reprinted as an appendix to this brief. The Mobile board has made extensive use during very recent years of non-contiguous or split attendance zones with pupils transported outside their neighborhoods to promote racial segregation. The HEW plan urged by petitioners in the courts below (Plan B-1 Alternative) would integrate all schools in Mobile by use of transportation facilities and techniques of the same kind used by the Mobile board to

keep the system rigidly segregated. The court below acknowledged that "any one of the" HEW plans "would lead to a unitary system" but declined to require the board to make use of the same techniques to integrate the system that were used to keep it segregated. In the absence of any record showing that use of transportation to integrate all the Mobile schools as proposed by the HEW Plan B-1 Alternative is "unworkable" the board has not carried the "heavy burden" necessary to support the use of "a less effective method" of desegregation. *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 439 (1968).

The concern for maintenance of traditional grade structures—for example, all six elementary grades in each school—should not be permitted to justify continued racially identifiable minority schools. The pairing technique widely used to promote desegregation usually involves the alteration of grade structures. For example, pairing might commonly involve combining the attendance areas for two schools serving grades one to six and assigning grades 1-3 to one school and 4-6 to the other. This has the effect of enlarging the attendance area of each school, and frequently that will be sufficient to integrate two previously segregated schools. The same effect can also be achieved by other techniques such as closing small schools and consolidating programs in larger schools, building larger facilities so that larger geographic areas can be served, providing non-adjacent attendance areas—variously called attendance islands, non-contiguous zones, satellite zones, etc.—for schools so as to promote integration, and readjusting grade structures in clusters of more than two schools. Although pairings require students to change buildings, they will not be constantly shifting to new environments for their entire classes will move together at the appropriate grade levels to the buildings serving

their schools. Each pupil will attend his nearest school during some years. In other years, he and his neighbors will go to a school which may be more distant. The court below said petitioners used a euphemism in calling this a "shared neighborhood" plan, but that phrase accurately describes the pairing technique. Each pupil will share his "neighborhood school" at some point with pupils from another "neighborhood."

Both the Fourth and Fifth Circuits are now firmly on record in support of the use of the pairing technique.[48] The Fifth Circuit has made it clear that it will not permit any abstract idea of grade structure maintenance to block desegregation: "The restructuring of the grade system in the proposed pairings is not, by itself, such an indicium of educational unsoundness as to render an otherwise feasible alternative unacceptable. *Andrews* v. *City of Monroe*, 425 F.2d 1017 (5th Cir. 1970). No particular grade structure can be considered inviolate when constitutional rights hang in the balance." *Brown* v. *Board of Education of the City of Bessemer*, No. 29209 (5th Cir., Aug. 28, 1970) (Ingraham, J.). The Fourth Circuit in *Swann* also has required that there be consideration of "every method of desegregation, including rezoning with or without satellites, pairing, grouping and school consolidation" (Appendix No. 281, p. 1277a). The Mobile School Board has used a great variety of differing grade structures in organizing the schools to keep them segregated. This is detailed in the Statement, *supra*. Whatever educational values there may be in particular grade structures have been subordinated to the value of racial segregation by the Mobile Board. Now, to satisfy the obligation of *Brown I*,

[48] See, e.g., Judge Goldberg's opinion in *Allen* v. *Board of Public Instruction of Broward County*, No. 30032 (5th Cir. Aug. 18, 1970), quoted at note 40, *supra*, wherein he collects a sampling of cases where pairing has been required.

these values must be subordinated to the value of integration.

The concerns often voiced for maintenance of psychological or sociological "neighborhood" values often mask an appeal for preservation of racial homogeneity which is in the teeth of *Brown I*. The only sense in which such neighborhood values have been honored in Mobile is that where neighborhoods have been racially homogeneous the racial lines have coincided with the school lines. But assertions of such concerns as having schools accessible to homes so that parents can attend PTA meetings easily, and pupils can relate to a "neighborhood institution" are mostly reflections of a sentimentalized view of neighborhood schools having little relationship to reality in a nation where 40% of all children routinely ride the buses to school every day. For the small child whose school is far enough from home to require a bus ride, the value of closeness to home is already dissipated. Our nation's public schools (and often private schools, too) have been organized so as to utilize transportation technology and to subordinate values of closeness to home. The whole movement away from the one-room schoolhouse to the consolidated school has been based in part on use of the school bus and on a judgment that busing is a routine and useful tool of educational administration.

The Fifth Circuit "neighborhood school concept" does not rest on any established concern for the safety of children traveling to school. The rigid rule of *Orange County* using strict proximity zoning and building capacity expressly disclaims any variances for traffic problems (*Ellis, supra*, 423 F.2d 203, 208). Judge Simpson's opinion in *United States* v. *Indianola Municipal Separate School Dist.*, 410 F.2d 626 (5th Cir. 1969), demonstrates that claims based on safety must be closely analyzed, and that where

pupils of both races have freely crossed alleged "hazards" to attend segregated schools such claims are often mere excuses for not desegregating schools. Generally speaking, real safety hazards can be overcome by furnishing transportation to students if other means will not suffice. Segregation cannot be maintained on the theory that desegregation involves "safety hazards."

The concern that pupils not be bused to a neighborhood mainly inhabited by persons of another race because that neighborhood may be strange or "hostile" rests in essence on opposition to integration. This kind of hostility can no more be used to justify preserving segregation than any other form of opposition to integregation. *Cooper* v. *Aaron*, 358 U.S. 1 (1958). When segregation was the legal norm—and in places like Mobile long after *Brown I*—it was never thought that the value of going to school in a familiar neighborhood was sufficiently important to justify a breach of the racial rule decreed by segregation laws and practices. Such a value cannot be asserted now as an excuse for continuing the segregation patterns created by law. Segregation cannot be maintained on the basis of an appeal for maintenance of the comfortable patterns of the segregated past. To be sure, it will be a new experience for white children to be bused to a black residential area in many of our communities. This novelty consists mainly in the newness of integration, for the same children are now frequently bused equal distances from their homes in all-white neighborhoods. The opposition of white parents to busing of their children to black schools (or formerly schools now integrated but in black residential areas) is grounded in fear, prejudices and opposition to integration. Such obstacles must be overcome if the Equal Protection Clause is to be given full meaning. *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

The elimination of racially segregated dual systems cannot be accomplished on the basis of desegregation techniques that require only busing of black pupils and which place all of the burdens of change on the black community. The Fifth Circuit now uniformly requires that school boards offer blacks left in all-black schools the option of transferring to *any* white school under a majority-to-minority transfer plan with free transportation and a priority for space—they can "bump" neighborhood whites if necessary. See, e.g., *Allen* v. *Board of Public Instruction of Broward County*, No. 30032 (5th Cir., Aug. 18, 1970). The device—like freedom of choice—depends on the courage of black children to break segregation patterns. It also disregards the professed concern about placing children in "strange and hostile" neighborhoods.

No lasting change can be expected by the use of desegregation plans which limit desegregation to those white citizens—mostly of lower incomes—who reside closest to the black ghettos while affluent areas remain segregated. Such plans are mere blueprints for racial separation in the future because of resegregation and the flight of whites from heavily black areas.

We cannot, under the Constitution, "consign another generation of children to education in racially isolated schools" while hoping for residential desegregation to be achieved through open housing laws.[49] It may be plausible to hope that fair housing laws will enable blacks to escape the ghetto. But there is little reason to expect that even a vigorous enforcement of such laws—and they now depend for the most part on case by case litigation by private citizens—will have any impact on the all-black schools.

[49] Statement of the United States Commission on Civil Rights concerning the "Statement by the President on Elementary and Secondary School Desegregation," April 12, 1970.

The concept that the black schools in the all-black neighborhoods might become integrated as the result of fair housing laws rests on assumptions entirely outside the experience with such laws—that whites will use fair housing law to move into black neighborhoods and thus integrate those neighborhoods and in turn integrate the all-black schools. The Fifth Circuit's statement that its policy of leaving all-black schools will be alleviated in the future by fair housing (see, e.g., *Hightower* v. *West,* No. 29993 (5th Cir., July 14, 1970) is merely an illusion. The idea that fair housing laws will enable Negroes to move to white neighborhoods (see *Ellis* and the opinion below) expresses a very long range hope. However, there is reason to fear the opposite result, that the "neighborhood school concept" will encourage housing segregation as an escape from school integration. As Judge Sobeloff observed in *Swann,* the rule "furnishes a powerful incentive to communities to perpetuate and deepen the effects of race separation so that, when challenged, they can protest that belated remedial action would be unduly burdensome" (Appendix No. 281, pp. 1290a-1291a).

We believe that our proposed principle, forbidding relegation of pupils to black schools except in cases of absolute unworkability of integration plans, has a number of merits. They include simplicity, uniformity, flexibility and satisfaction of the constitutional objectives stated in *Brown I.*

The virtue of relative simplicity is found in the sole exception based on the test of "workability." A test focusing on the goal of complete integration in every case except where desegregation simply cannot work can hope to reduce litigation and bring protracted litigation to an end. The multiple appeals in this case led Judge Goldberg to call plaintiffs' efforts to integrate the schools of Mobile County

"an almost Homeric odyssey."[50] Unfortunately, Mobile is not unique in being a community still largely having segregated schools notwithstanding years and years of litigation by Negro pupils seeking their rights under *Brown*. Our proposed principle is not offered as a panacea that will bring all litigation about school segregation to an end—that is too much to expect in the area of disputes about racial equality. But the relative simplicity of the rule, and its focus upon the practical workability of desegregation proposals should hasten the end of litigation in the same way this Court's decisions in *Green* and *Alexander* have accelerated the same process.

The principle petitioners urge will do much more to promote uniformity in desegregation enforcement than the approaches of the Fourth and Fifth Circuits. Our approach is not based on "balancing" the values of a "neighborhood" concept against the value of integration. The Fifth Circuit's "neighborhood" formula and the Fourth Circuit's "reasonableness" test involve the kind of judgmental balancing and evaluation of competing values in every case which insures that there will be little uniformity in desegregation case results where different men do the judging. The Fifth Circuit approach puts a premium on *ad hoc* evaluation of whether a particular school pairing for example, is really "worthwhile" to achieve integration or whether there has already been "sufficient" integration of other pupils in the system. There is no way to get uniformity with such a principle, and the best response that the Fifth Circuit can make when there is a criticism of the lack of uniformity of decision-making (as in Judge Clark's dissent in *Ross* v. *Eckels*, No. 30080 (5th Cir., Aug. 25, 1970)) is to say that "each case had to be judged on all

[50] *Davis* v. *Board of School Commissioners of Mobile County* (*Davis* v. *United States*), 422 F.2d 1139, 1140 (1970) (611a).

facts peculiar to this particular system," that "school cases are unique" and that "each school case must turn on its own facts." (*Ross* v. *Eckels, supra,* opinion of the court.)

The approach we urge has flexibility. It is flexible in that the *means* of desegregation may remain in local control so long as the goal is achieved. The major means of desegregation currently being used are discussed elsewhere in this brief. School consolidation and school closing, pairing or clustering schools, readjusting school zone lines, controlling school sizes through construction, expansion, portable classrooms and other means, site location, the use of non-contiguous or split zones, and transportation systems are all part of the technology of educational administration which can be adapted to serve the goal of desegregation. The Fourth Circuit has declared broadly in *Swann* that all such methods and any others must be considered. We urge that this Court follow the same pragmatic view of the available techniques. None of the techniques will suffice in every case. But generally flexible practical approaches can solve desegregation problems where there is the will to find such solutions.

The test of "absolute unworkability" leaves a doctrinal basis for dealing with the really extreme situations that may exist in a few communities, without allowing the unusual problems to paralyze the search for solutions of more typical desegregation problems. As the Civil Rights Commission has stated:[51]

> It is a mistake to think of the problems of desegregation and the extent that busing is required to facilitate it solely in the context of the Nation's relatively few giant urban centers such as Chicago, New York, or

[51] Statement of the United States Commission on Civil Rights concerning the "Statement by the President on Elementary and Secondary School Desegregation," April 12, 1970.

> Los Angeles. In most of our cities the techniques necessary to accomplish desegregation are relatively simple and create no hardships.

And also:

> The Commission is aware that the problem of school segregation is one of enormous difficulty and complexity. Yet a realistic assessment of the scope and dimensions of the problem should not result in resigned acceptance of its indefinite continuation or a defeatist conclusion that it is beyond our capacity to resolve. The Commission is convinced of the ability and will of the American people to respond affirmatively to a call to end the injustice that school segregation represents.

Finally, the principle stated by petitioners satisfies the Constitution. The Fifth Circuit has offered no satisfactory alternatives in a "neighborhood school concept" which can function as it has in Mobile to leave half of the black elementary pupils in schools which are unmistakably black—either all-black or virtually all-black. *Brown* must promise something more than a regime in which black children remain in the same black schools under a new justification. We believe our statement of the goal—no more black schools—is consistent with *Brown*. The Fifth Circuit announced this rule shortly after the *Green* decision (in *Adams* v. *Mathews*, 403 F.2d 181, 188 (5th Cir. 1968); *Henry* v. *Clarksdale Municipal Separate School Dist.*, 409 F.2d 682, 689 (1969); *United States* v. *Indianola Municipal Separate School Dist.*, 410 F.2d 626, 628 (1969)), and retreated from it after the requirement of immediate desegregation became established by *Alexander* and *Carter*, *supra*. We believe that our statement of the goal of dese-

gregation is entirely supported by this Court's decision in *Green* v. *County Board of New Kent County*, 391 U.S. 430, 435, 442 (1968):

> The pattern of separate "white" and "Negro" schools in the . . . system established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws. (391 U.S. at 435)
>
> • • •
>
> The Board must be required to formulate a new plan and . . . fashion steps which promise realistically to convert promptly to a system without a "white" school and a "Negro" school but just schools. (391 U.S. at 442)

The decision of the Court in these cases may decide whether the promise of *Brown* will be kept for thousands upon thousands of black children. That promise is broken by the current approach of the Fifth Circuit which leaves segregation intact in the main institutions of dual systems——the all-black schools. The current approach of the lower courts represents a new kind of gradualism which functions in much the same manner as the doctrine of "deliberate speed," now repudiated by *Alexander* and *Carter*. This Court should require that school districts maintaining dual systems desegregate the schools now and maintain them in a desegregated status without separate racially identifiable minority schools.

V.

Final School Desegregation Plans Should Not Be Approved Without Evidentiary Hearings. Petitioners Were Denied Due Process by the District Court's Ex Parte Procedures in Deciding the Case.

The Fifth Circuit's "neighborhood school principle" is so inherently unclear and subjective as to highlight the need for a full and fair development of the facts in adversary proceedings following the usual procedures. Findings of Fact based on such an adversary record and evidentiary hearings are all the more vital in a case such as this where the Fifth Circuit, and now this Court, is called upon to announce general principles of law which will vitally affect hundreds of thousands of citizens. Adherence to fundamentals of procedural fairness is essential where such vital public interests are at stake. Regretfully this case has been litigated in the district court by procedures which fall so far short of the essentials of fair play and due process as to call for special condemnation and the exercise of this Court's supervisory powers over the functioning of the lower federal courts. We are not complaining about some minor or isolated irregularity caused by the need for expeditious decision of the case, or the stringent time limitations imposed by the court of appeals. This record shows a consistent denial of evidentiary hearings over a period of years and the decision of important constitutional rights upon the basis of *ex parte* unsworn factual submissions to the district judge by the respondent school board. This consistent course of denials of fundamental fairness undermines the integrity of the entire judicial process.

The principal episodes we complain of are these: (a) denial of a hearing prior to entry of order of August 1,

1969 ordering a desegregation plan based in part on an HEW submission—*ex parte* meetings with court, school board and HEW; (b) denial of hearing prior to entry of order of January 31, 1970 approving school board plan with modifications—board plan never served on plaintiffs until February 27, 1970, nearly a month after its approval by court; (c) denial of hearing prior to order of April 14, 1970 making findings of fact at request of court of appeals entirely based on school board affidavits; (d) denial of notice or hearing and consideration of *ex parte* factual submissions prior to entry of order amending desegregation plan entered July 13, 1970; and (e) denial of notice or hearing and consideration of *ex parte* factual submissions prior to order of July 30, 1970 changing zones for 32 schools.

August 1, 1969 Order. Denial of a hearing following the Fifth Circuit's decision of June 3, 1969 was in direct disobedience of that court's order which stated that: "For plans as to which objections are made or amendments suggested, or *which in any event the district court will not approve without hearing,* the district court shall commence hearings beginning no later than ten days after the time for filing objections has expired." (414 F.2d 609, 611; emphasis added.) Nevertheless the district court held no hearing. The school board took the depositions of Dr. Joe Hall the responsible HEW official. When the United States attempted to take the depositions of the school board president and associate superintendent of schools the district court prevented this by granting a board motion that the depositions not be taken. On July 3, 1969, the district judge held an *ex parte* conference with school board representatives and HEW officials. Petitioners' attorneys had no notice of the meeting and learned of it when the board filed a stay application with Mr. Justice Black in July

1969, seeking a stay in part based on "facts" from the *ex parte* meeting.

January 31, 1970 Order. The court had before it two new HEW plans filed December 1, 1969, a school board plan of the same date and a Justice Department proposal submitted for the balance of the school year, at the time it entered the January 31, 1970 order. On January 14, 1970, this Court ordered that complete desegregation proceed in Mobile County not later than February 1, 1970. *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 (1970). The court held a "pretrial conference" January 23, but no trial. The district court thus ignored the suggestion in Mr. Justice Harlan's concurring opinion in *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290, 292 (1970), that where HEW desegregation proposals were "already available the school districts are to bear the burden of demonstrating beyond question, *after a hearing,* the unworkability of the proposals . . . ." (Emphasis added). On January 2, 1970—a month after the board's plan was filed and when informal efforts were exhausted—petitioners filed a motion asking that they be served with a copy of the board's plan, which was filed with the court. The January 31 order adopted the board's plan with some modifications. Nearly a month later the district court on February 27, 1970 granted petitioners' motion for a copy of the board's plan, which was then served by the board. The district judge chose between the four plans presented without hearing any evidence. There was no opportunity for the parties to examine witnesses and present evidence with respect to the workability of the four plans under consideration.

April 14, 1970 Order. Because the district court had made no fact findings on matters the Fifth Circuit believed to be relevant, that court remanded the appeal for the trial judge to make findings of fact. Petitioners moved in the

district court on April 6, 1970 to establish a procedure whereby the board's proposed findings might be tested by an evidentiary hearing. This motion was denied April 14th. The district judge accepted the board's affidavit "excluding self-serving declarations and speculative opinions" as its own fact findings.

July 13, 1970 and July 30, 1970 Orders. The district court twice amended the desegregation plan in July, 1970 without any notice to petitioners. On at least two occasions new statistical information listing the numbers of pupils in each school by race under various versions of the plan were filed in the clerk's office by someone—presumably the court. The data apparently comes from the school board but its origin is not indicated. Nevertheless it has promptly been adopted in the district court order, and in the Fifth Circuit opinion of August 4, 1970.

Petitioners' repeated complaints to the Fifth Circuit about ex parte dealings and denial of hearings evoked little response from that court[52] until the Fifth Circuit opinion of August 28, 1970, which finally ordered rather cryptically that:

> (5) Henceforth, any time the school board desires to have changes in zone lines made, it shall give reasonable notice to the parties.

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[52] In a collateral proceeding, wherein district judge Thomas had enjoined certain civil rights advocates from engaging in certain demonstrations on the request of the school board, the Fifth Circuit did reverse because of the trial court's failure to make findings of fact. *Davis* v. *Board of School Commissioners of Mobile County* (*Davis* v. *United States*), 422 F.2d 1139 (5th Cir. 1970) (611a). The court refused a hearing on the evidence insisting that testimony be by affidavit only in connection with the preliminary injunction. This practice, too, may deny litigants a fair opportunity to develop the facts. See *Louisiana ex rel Gremillion* v. *N.A.A.C.P.*, 366 U.S. 293, 298 (1961) (Mr. Justice Frankfurter, concurring).

As the case now stands a final desegregation plan for Mobile's thousands of pupils has been approved without any semblance of an evidentiary hearing.

There can be no doubt that the procedures followed by the district court in this case do not comport with the fundamentals of due process. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385 (1914). Important rights may not be adjudicated on the basis of the privately acquired knowledge of the judge where a litigant is given no opportunity to make a showing about contested matters. *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937). Due process is plainly not satisfied where one litigant communicates the vital facts to the court on an informal *ex parte* basis. See *Hall* v. *West*, 335 F.2d 481, 483-484 (5th Cir. 1964) condemning such *ex parte* consideration of another school desegregation case. A fair and open hearing is vital to the integrity of judicial proceedings. "Nothing can be treated as evidence which is not introduced as such." *Morgan* v. *United States*, 298 U.S. 468, 480, 481 (1936); *Interstate Commerce Commission* v. *Louisville & N.R. Co.*, 227 U.S. 88 (1912). "The right to such a hearing is one of the 'rudiments of fair play' (*Chicago, M. & St. P.R. Co.* v. *Polt*, 232 U.S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement." *Ohio Bell Telephone Co.* v. *Public Utilities Commission, supra* at 304. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment below should be reversed insofar as it fails to provide for the elimination of all remaining racially identifiable minority schools and the cause remanded for the immediate implementation of a complete desegregation plan in accordance with the principles urged in this brief.

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APPENDIX

Brief of the United States in the Court of Appeals: Statement of Facts and Appendices B, C and D

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Brief of the United States in the Court of Appeals: Statement of Facts and Appendices B, C and D

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29,332

BIRDIE MAE DAVIS, et al.,
Plaintiffs-Appellants,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor-Appellant,

v.

BOARD OF SCHOOL COMMISSIONERS
OF MOBILE COUNTY, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES

Issue Presented

Whether, in view of the circumstances of this case and more effective options available, the district court erred in substantially adopting the school board's desegregation plan.

Statement

1. *Procedural History*

This Court has twice recently considered this case.[1] In June 1969 the Court disapproved a plan combining elements of freedom of choice, zoning, and minority-to-majority transfers, 414 F.2d 609. The district court was directed to request the assistance of the Office of Education of the United States Department of Health, Education and Welfare. The Office of Education developed a two-step desegregation plan, reaching all rural schools and the schools in the western portion of metropolitan Mobile in 1969-70, and reaching the eastern urban schools in 1970-71. The district court adopted a plan substantially the same as the first step of the HEW plan and directed submission of a revised plan for the eastern schools. That decision was affirmed by this Court in *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969) (en banc) (per curiam), *rev'd as to timing sub nom. Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970) (per curiam).

On December 1, 1969, plans were filed by the school board and HEW. (At the court's request, the Department of Justice filed on January 27, 1970, a separate proposal for implementation pendente lite.) On January 31, 1970, the district court adopted, with some modification, the school board's submission based on geographic zoning. After the board directed the staff to discontinue prepara-

[1] For earlier proceedings see 364 F.2d 896, 898-900 (5th Cir. 1966); 393 F.2d 690 (5th Cir. 1968).

tions for desegregation in view of the enactment of a state statute prohibiting assignment of students to schools on the basis of race, the district court on March 16 directed that students be reassigned according to its January 31 order, as modified. On March 20 the order was implemented by the board.

This Court on March 25 remanded the case for supplemental findings. The district court ordered the school board to submit by affidavit the facts sought and adopted the information furnished by the board.[2]

2. *Facts*

A. The Mobile County school system, with 42,620 white and 30,884 Negro students, (November 26, 1969 Report to the Court) is the largest in Alabama. In maintaining and operating a system of this size educational and administrative decisions have been made periodically affecting such matters as construction, location of new facilities, alteration of zone lines, grade structures and the use of school transportation.

Grade Structures. The Mobile schools have had grade structures which include 1-5, 1-6, 1-7, 1-8, 1-9, 1-12, 2-5, 6-7, 6-8, 6-9, 6-10, 6-12, 7, 7-8, 7-9, 7-11, 7-12, 8-12, 9-12, 10-11, 10-12. One school housed grades 1-4, 6 and 8 during the 1962-63 school year. (Pl. Ex. 22, 23, Pl.-Int. Ex. 29, July 1967 Hearing; A. in Nos. 27,260 and 27,491 Vol. I pp. 6-13; November 26, 1969 Report to the Court.)[3] Many

[2] The district court adopted the statistical information attached to the affidavit and indicated its belief that the "general information" furnished in the document "excluding self-serving declarations and speculative opinions" was correct.

[3] There are printed records from previous appeals in this case on file with the Court, and evidence has been introduced at several hearings. We will cite the printed records filed in early appeals by using R. for the 1965 appeal and A. for the printed appendices in the three appeals taken in 1968 and 1969. When referring to exhibits which are not part of printed records, we will indicate the date of the hearing and the exhibit number.

of the grade organizations had a clear racial effect: The Hillsdale school (Negro), located in a small Negro community surrounded by white neighborhoods, was the only facility in the metropolitan area that has served grades 1-12 (A. in No. 26,886 Vol. V P. 1527-1530);[4] the Marechael building was used as a one-grade school in 1963-64 to supplement the Emerson and Southside plants (both Negro) (Appendix A to our Trial Brief filed in this Court on September 23, 1967 in No. 25,175, p. A-2); and the Turnerville (Adams) plant covered grades 6-7 during 1965-66 and 1966-67 in order to absorb the 6th grade at all-Negro Whitley and the 7th grade at the Mobile County Training School, also a Negro school. (*id.* p. A-7).

Grade reorganizations were also made to cope with enrollment trends in the downtown Mobile and Prichard schools. White schools in this area were losing students while the enrollment at Negro schools increased,[5] and, as the number of students living in the area served by a school decreased, additional grades were often added to maintain the level of enrollment. The Gorgas school, for example, was expanded from grades 1-6 in 1964-65 to 1-7 in 1965-66 (Pl. Ex. 22 and Pl.-Int. Ex. 29 at July 1967 Hearings), and the Toulminville School was expanded from 7-9 in 1962-63 to 7-10 in 1963-64 and 7-11 in 1964-65 (*Id.* Pl.-Int. Ex. 29).[6]

Students have often been required to attend schools for a brief period before changing to another facility. For example, 6th grade students who attended Gorgas in 1965-66, were assigned to Old Shell Road for the 7th grade in 1966-67 (Appendix A to Trial Brief at p. A-10), Phillips

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[4] In 1968 it was reduced to 1-9 and in 1969 to 6-8.

[5] In 1966 the school board studied this problem and made a detailed report on it. See Trial Brief, Appendix B.

[6] In 1965-66 Toulminville was made a Negro school covering grades 10-11 only. See p. 18, *infra*.

for the 8th grade in 1967-68 (Ibid.), and Murphy in 1968-69 for grade 9 (A. in Nos. 27,260 and 27,491 Vol. I, p. 10). A 6th grade student at Emerson in 1963-64 would attend four schools in five years: grade 6 at Emerson, 7 at Marechael, 8 and 9 at Southside (Appendix A to Trial Brief, p. A-2), and grade 10 at Williamson (Pl. Ex. 23 at July 1968 Hearing). While some of these school changes were the result of opening and closing schools for racial reasons,[7] the board has used similar feeder organizations on a permanent basis. Pupils in the Indian Springs zone go to Indian Springs for the 6th grade, Eight Mile for the 7th and 8th, Clarke for the 9th, and Vigor for the 10th (A. in No. 26,886 Vol. IV, pp. 1331-1332).

The board's alterations in the grades taught at particular schools required, from time to time, that elementary school facilities be used for junior high or middle school grades,[8] that junior high plants be used for senior high grades,[9] and that senior high buildings house elementary and junior high grades.[10]

In making grade changes the board has paired (or grouped) two or more schools located on separate campuses to serve one set of grades. For 1963-64 the Emerson School zone was served by three schools: Emerson, grades 1-6; Marechael, grade 7; and the Old Lee School (later renamed Southside), grades 8-9. (See Appendix A to Trial Brief,

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[7] See *infra*, pp. 16-18.

[8] *E.g.*, Carver and Hall which are now being used as middle schools were both built as elementary schools, and last year Craighead was a junior high.

[9] *E.g.*, Toulminville was built to house only junior high students, and Williamson, which is now a senior high, covered grades 8-12 last year.

[10] *E.g.*, Hillsdale originally covered grades 1-12, but last year the board recommended using the plant for grades 1-9.

p. A-2).[11] During the 1964-65 school year, four schools were grouped to educate the white children in grades 1-6 in the Saraland-Satsuma area. (*Id.* at A-4). From 1965 to 1967 the Turnerville (Adams) school was grouped with Whitley and Mobile County Training Schools, located about 1.6 miles from Turnerville.[12]

Zones. In order to utilize efficiently available classroom space, the board has employed zoning, including noncontiguous or split attendance zones. As many as 18 noncontiguous attendance areas were used in a single year. (Appendix A to Trial Brief).[13] The zones included instances of combining rural areas with portions of metropolitan Mobile[14] and combining two or more noncontiguous areas in the city.[15] Maps on page 7a illustrate split elementary zones by shading in the same color areas served by the same school.[16]

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[11] Marechael was evidently always paired with Southside and is never mentioned separately when reports were made even though they are located several blocks apart.

[12] See also, *e.g.*, Snug Harbor (later Palmer) which was paired wtih Carver and Grant; and Toulminville, which was paired with Central. App. A to our Trial Brief at p. A-10.

[13] Appendix C, infra, lists the noncontiguous zones which were proposed or noted by the pupil placement recommendations each school year. It should be understood that the placement bulletins do not mention many of the split zone assignments that are to be continued without change.

[14] See *e.g.*, Old Shell Road-Griggs areas (Appendix to Trial Brief pp. A-4, A-10, A-11), St. Elmo-Hillsdale area (Id. p. A-5), and Brookley Air Force Base-Theodore (Id. p. A-2).

[15] See *e.g.*, Whistler zone (R. in No. 22,759, p. 253).

[16] Because most of the zones shown were used between 1964 and 1967 a 1965 map is used. See A. in No. 26,886, Vol. VI, P. 1. In some instances only certain grades were assigned to a school from its noncontiguous zone, and in other cases only Negro or white children in an area were assigned on the split-zone basis. The zones are taken from Appendix A to Trial Brief, except for the students transported to Rall from South Brookley which is taken from Appendix B to Trial Brief, p. 5.

Portable Classrooms. The Mobile County school system presently has 268 portable classrooms (A. in No. 26,886 Vol. I, pp. 90-94) which are shifted among schools as they are needed. For example, in preparing for the 1964-65 school year the board discontinued use of portables at the Lott and Brazier schools and added portables at twelve other schools. (Appendix A to Trial Brief, p. A-6). In 1963-64 the Hillsdale School (grades 1-9) had 24 portable and no permanent classrooms. (Pl. Int. Ex. 29, July 1967 hearing). In 1967-68 portable classrooms composed 50 per cent or more of the regular classroom space at thirteen schools in the system.[17]

Assignment of portables often reflects racial considerations. Thirteen portable classrooms were in use in 1967-68 at all-Negro Toulminville High School while traditionally white Murphy High, serving an adjacent attendance area, had none and was 410 students undercapacity. (A. in No. 26,886 Vol. I, pp. 92-93). In the same year the Negro Washington school had 15 portables while Phillips, a traditionally white junior high serving the adjacent attendance zone, had no portables and was 114 students undercapacity. The Nelson Adams School (Negro) serving grades 1-12 had no portables in 1967-68 although the (white) Lee (1-6), Saraland (1-6), and Satsuma (7-12) schools together serving basically the same attendance area as Adams, needed 14 portables, with 12 at Satsuma. All-Negro Blount High School (Negro) had 19 portables in 1967-68, while traditionally white Vigor High, located about six blocks away, had no portables and was 62 students under its normal capacity. (Id. pp. 90, 93).

Transportation. Mobile County school officials have traditionally provided transportation to students in the urban

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[17] An appendix to this brief, infra, p. 64, contains the number of portable classrooms used or recommended between 1964 and 1968 at schools where portables constituted substantial portions of the total capacities.

as well as the rural portions of the system. Between 1964-65 and 1967-68 the board bused from a high of just under 25,000 students to 22,094 per year. During this time it spent from $405,833 to $503,934 per year to operate the buses and between $43,787 and $137,911 on new buses each year. (Office of Education July 10, 1969, submission)

In 1966-67, in the metropolitan area alone, the board bused more than 7,000 students, approximately 2,350 of whom were transported because of noncontiguous zones.[18] (A. in No. 26,886, Vol. I, pp. 5-6). Over 580 were bused about 6.3 miles from the rural Saraland and Satsuma areas to the Mobile County Training School (Negro) located in the eastern section of metropolitan Mobile; 381 elementary and junior high school children were bused from the at-

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[18] The 1964-65 pupil-reassignment notice provides in part:

South Brookley—will serve its district for grades 1-5. The sixth grade will be transported to Craighead along with students presently transported.

Craighead—will serve its district for grades 1-6, plus the students formerly transported to Oakdale from Morningsdale in grades 1-6, those formerly transported to Arlington from Williams in grades 1-6, those presently transported to Craighead from South Brookley in grades 1-6 and the 6th grade from South Brookley.

Tanner Williams—grades 1-9 for its district only. Students now transported from Shaw and Semmes will return to those schools.

Fonvielle—reduce district and assign to Stanton Road. Will serve grades 1-5 with 6th grade transported to Palmer.

Hillsdale—grades 1-12. Discontinue transportation to St. Elmo. Double session grades 1-4 until building is complete in November. Add to Hillsdale students transported from Highway 98 west (beyond Howell's Ferry Road), formerly transported to Warren, Washington and Central.

Thomas—grades 1-8. Assign 8th grade to Blount. Continue to transport those students enrolled at Mobile County Training.

The assignments are taken from our Trial Brief, Appendix A, p. A-4, A-5. For a more complete list of split zones where transportation was offered see the remainder of Appendix A to the Trial Brief and appendix to this brief, *infra* p. 61.

tendance areas served by the white Austin school (white) to the Warren and Washington schools (Negro), all of which are located in the city. (Ibid.)

Some schools in the city have a high percentage of their students transported from other areas. In 1966-67, approximately 61 per cent of the third grade pupils at Craighead school were came from other attendance zones (Appendix C to Trial Brief, p. C-33) with the majority of the out-of-district students bused from the South Morningside and South Brookley areas about 5.5 and 7.4 miles away. At the Old Shell Road School for the same year 46 per cent of the third graders lived in other attendance zones, (Id. p. C-34), coming from as far as the Todd Acres area, located outside the city limits about 11.4 miles away. The Todd Acres students (white) who were bused lived closer to at least 10 other elementary schools, most of which are also white schools.

Construction. The board has consciously selected building sites and constructed schools in a manner designed to perpetuate separate schools for Negro and white children. A report prepared by the school staff in 1967 discussing some of the existing school capacity problems treated separately problems of overcrowding in Negro schools and problems of underpopulation in white facilities in the same downtown Mobile area.[19] Rather than reassign the students to utilize the existing schools equally, the board made plans to construct four schools in Negro areas and build an addition to a fifth which "will relieve 35 of the 39 portables now in use in the formerly Negro schools of this area." (Report, Appendix B to Trial Brief, pp. 5-6)

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[19] The reports notes 23 vacant classrooms at "formerly white schools" and predicts a possible additional 21 vacant classrooms at those schools; separately treated were "formerly Negro schools" having 39 portables. See *Report on Research of the Pupil Personnel for Use in Planning for the Full Utilization of School Facilities in Downtown Area.* See Appendix B to Trial Brief.

The school system has a standard form used to justify the need for establishing a new plant on a particular site (Pl. Int. Ex. 61 July 1967 hearing). The form requires a listing of the distances to the closest schools offering the same grades, distances to the closest schools accommodating higher grades, and schools where children in the proposed new district are now enrolled. In every case where these questions are unanswered, the schools listed are of the same race. If a school for Negroes is contemplated, all the schools listed are Negro; if a school for whites is planned, all the schools named are white.

Mobile County school officials, in order to determine the racial composition of a contemplated new school, consult with agencies whose programs may affect the need for school facilities. For example, in 1964 the Prichard Housing Authority informed the school system of the number of nonwhite students who would be living in the "newly formed Robbins District"[20] (Pl. Int. Ex. 87, July 1967 hearing) and, after the school officials asked about white children, replied that in calculating the number of students living in the urban renewal area to be included in the school attendance zone, "[t]he ratio of white families and children is not included as we believe that each and every white family located within this 116 acres will relocate outside of the area." (Ibid.)[21] When the Robbins school was completed, it housed only Negro children.[22]

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[20] Similar letters were written concerning the all-Negro Blount High School (Pl. Int. Ex. 87, July 1967 hearing).

[21] The area served by Robbins had previously been discussed on May 1, 1963, in a memorandum from an assistant superintendent to Dr. Burns saying (Pl. Int. Ex. 87, July 1967 hearing):

> If the Board is to go along with permanent use of Snug Harbor and Turnerville for housing Negro children and by the building of the New Prichard Elementary School, north of Carver, I think that you can see that they are fairly well housed.

[22] In addition to consulting with other governmental agencies, the school officials sometimes checked with the leaders of the Negro

The location and design of many schools reflect the racial considerations in their planning.[23] Blount High School (Negro) with a capacity of 1972 students was built about six blocks from the traditionally white Vigor High School (capacity 1769) (A. in 26,886, Vol. VI, p. 40). The Williamson Junior-Senior High School (capacity 1350), also Negro, was built about 14 blocks from the white Eanes Junior High School (capacity 1218) and less than 20 blocks from the white Murphy High School (capacity 2813) (Id. pp. 40, 42). The Mobile County Training School was rebuilt in 1967 on the back edge of a Negro neighborhood, and is bordered on the other side by the Mobile River, even though, as the Acting Director of the Mobile City Planning Commission testified, the population in its service area was not sufficient to support a high school (Id. Vol. III, p. 929).[24]

School Closings and Conversions. The school board has closed white schools with declining enrollments which were located near overcrowded Negro schools and has converted

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or white communities depending on which racial community a new school was planned to serve. When the new Cleveland School (now called Adams) was being considered, the board sought the advice and assistance of the Negro community in the areas to be served. (A. in No. 26,886, Vol. III, pp. 758-765; Pl. Ex. 25, July 1967 hearing).

[23] The most recent construction efforts of the school board—to build a new high school on the same campus as the existing all-Negro Gorgas and Toulminville schools, and replace the Negro Howard Elementary School—were enjoined by this Court pending the appeal which resulted in the June 3, 1969, decision. 414 F.2d 609. The June 3 order continued the injunction until attendance zones were drawn in accordance with the Court's mandate. 414 F.2d at 610.

[24] Similarly, the Hillsdale School was planned and equipped for students in grades 1-2 because there was no Negro junior or senior high school nearby. The Toulminville and Prichard schools were constructed as white junior high facilities with capacities of only 609 students—far less than any other junior high in the metropolitan area. Such design is consistent with the fact that they

other underpopulated white schools into all-Negro facilities. Predominantly white Oakdale, Barton, and Russell, all serving areas adjacent to zones served by overcrowded Negro schools, were all closed because their white enrollments were too small to permit their efficient operation as white schools.[25] After several years of declining white enrollment at Arlington school, the board proposed for 1968-69 that the school serve students transported from South Brookley, a noncontiguous area (A. in No. 26,886, Vol. VI, p. 41). Arlington served an attendance zone adjacent to the area served by the Council school (Negro). The district court ordered that Arlington be used to serve the elementary students in the area surrounding it, and its enrollment was 384 white and 153 Negro. (A. in Nos. 27,260 and 27,491, p. 6). The board's December 1969 plan proposed closing Arlington, and it is now closed pursuant to the district court's adoption of that plan.

An alternative to closing white schools was suggested in a May 1963 memorandum from an assistant superintendent suggesting that there were enough schools in the Prichard area and the only problem was "in having the schools adjusted to the Negro or white population." (Pl. Int. Ex. 87, July 1968 hearing). Thus, in that year, the board changed two previously white schools in the Prichard area, Snug Harbor and Turnerville, to all-Negro schools.[26] For the

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served small white neighborhoods with the former school's zone surrounded by Negro residential areas and the latter's bordered on three sides by Negro areas. The new Southside Junior High School proposed by the board was planned as another small facility, with just enough space to accommodate the pupils feeding in from the Negro Emerson and Council elementary school areas.

[25] The board proposed a similar closing for old Shell Road, but the proposal was successfully opposed by the white community and the private plaintiffs and the government in this case.

[26] Even with the conversion of these two schools, Dr. Scarborough suggested other facilities might have to be changed. On May 1 he wrote a memorandum to the Superintendent saying: "[I]t is my

1963-64 school year the white students and teachers were reassigned to other schools.[27] The schools were renamed Adams (Turnerville) and Palmer (Snug Harbor) after prominent Negroes (*Id.*, Addenda to Board Agenda dated August 28, 1963) and given new attendance zones (*Id.*, Memorandum from McPherson to Scarborough dated August 20, 1963). Only Negro students and teachers were assigned to the schools; and they opened the following year as all-Negro schools, each having effectively been "converted from a white school to a Negro school" (Pl. Int. Ex. 87, July 1968 hearing, undated recommendations attached to minutes of August 28, 1963, board meeting).[28]

Similar conversions were effected at Toulminville, Gorgas, Southside, and Howard schools. Toulminville, for example, offering grades 7-11, was officially "closed" in March 1965.[29] (A. in No. 26,886, Vol. II, p. 95; Pl. Int.

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opinion that if more Negroes move in that area [Prichard] we again would have to abandon another white school and that it in turn could house the increase of Negroes. . . ." (Pl. Int. Ex. 87, July 1967 hearing).

[27] In effecting the conversion the board sent a questionnaire to each parent asking whether he planned to be living in the attendance zone for 1963-64 and requesting that he indicate a preference of three white schools in case the school his child attended was closed. (Such practices indicate how a school board can affect residential make-up.) These and other school conversions are discussed in detail in our trial brief, pp. 39-63.

[28] Adams was closed at the end of the 1966-67 school year, with students reassigned to the new Cleveland school (later renamed Adams) and to Mobile County Training School, both of which are Negro schools (*Id.* Ex. 14).

[29] At that time, students were reassigned, on paper, to two other schools and parents were notified of the reassignments. Actual reassignments were made the following fall. Toulminville had been expanded from grades 7-9 to 7-11 before the closing, was subsequently again expanded from 10-11 to 10-12 after the conversion. (Pl. Int. Ex. 23, July 1967 hearing). The school was also converted from an annex to Central to an independent facility with its own attendance area. (Pl. Int. Ex. 84, July 1967 hearing). See p. 5 *supra*.

Ex. 1, 83, 87, July 1967 hearing). At the commencement of the following year, after its students, teachers, and administrators were transferred to other schools, Toulminville opened with a Negro student body and faculty, and a grade structure of 10-11, as an annex to Central High (Negro). (Pl. Ex. 17, 22, Pl. Int. Ex. 94, 84, July 1967 hearing). In 1966-67 and 1967-68 the school board acted on the Gorgas school in the same manner. (A. in No. 26,886, Vol. II, p. 95).

APPENDIX B

This Appendix shows for each school in the system which was used this year, its normal capacity, the enrollment and grade structure as of September 26, 1969, the grade organization and projected enrollment under each of the desegregation plans before the district court on January 31, 1970, and the enrollment and grade structure as of March 23, 1970, under the district court's order.

The chart is based on the November 26, 1969, Report to the Court filed by defendants, the desegregation plans filed by the United States Office of Education on July 10, and December 1, 1969, the attendance zone maps and projected enrollments filed by defendants on December 1, 1969, the attendance zone maps and projected enrollments submitted by the United States on January 27, 1970, and the Attachment D1 to the affidavit of James McPherson filed in the district court on April 10, 1970. The latter data should reflect the assignments under the January 31 Order, as amended on February 4 and March 12.

Figures submitted by the Office of Education with its December 1, 1969, recommendations were in some aspects corrected during a January 22, 1970, conference with the Court and all parties. The chart reflects the corrected statistics.

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ENROLLMENTS UNDER DESEGREGATION PLANS AND THE DISTRICT COURT'S ORDERS

ELEMENTARY SCHOOLS

School			September 1969	Board Plan	HEW Plan B	HEW Plan B-Alt.	HEW Plan B-1 Alt.[42]	Government Jan. 27 Plan	March 23 Attendance
Arlington Cap. 462	W	(1-5)	307	CLOSE	(1-5)[43] 350	(1-5)	737	160	CLOSED
	N		237		Council 659	Council 659	(3-5) (Morningside 1-2) 437 Tot. Cap. 1584	(1-5)	
Austin Cap. 396	W	(1-6)	396	---------[45]	331	331	311	396	----------[47]
	N		22		(1-5) 84	(1-5)	(4-5) (Old Shell Road 1-3) 139 Tot. Cap. 891	(1-6) 22	
Glenville Cap. 660	W	(1-6)	262	(1-6) 300	CONVERTED TO HIGH SCHOOL				(1-6) 300
	N		299	313					329
Frazier Cap. 1122	W	(1-6)	0	(1-5) 0	10	10	355	10	(1-5) 0
	N		1123	983	(1-5) 1022	(1-5) 1022	(3-5) (Ind. Springs 1-2) 812 Tot. Cap. 1551	(1-5) 1022	808
Caldwell Cap. 594	W	(1-6)	0	(1-6) 13	CLOSE	1	291	0	(1-6) 20
	N		314	401		(1-5) 404	(1-3) (South Brookley 4-5) 255 Tot. Cap. 1023	(1-5) 350	375
Chickasaw Cap. 627	W	(1-6)	494	(1-6) 500	473	473	311	473	(1-6) 500
	N		3	0	(1-5) 100	(1-5) 100	(1-2) (Robbins-Hamilton 3-5) 662 Tot. Cap. 2112	(1-5) 100	0
Council Cap. 561	W	(1-5)	0	(1-5) 6	(1-5)[46] 350	(1-5) 350	737	4	(1-5) 2
	N		481	525	Arl. 659	Arl. 659	(3-5) (Morningside 1-2) Arl. 437 Tot. Cap. 1584	(1-5) 391	543
Craighead Cap. 891	W	MIDDLE SCHOOL		(1-5) 383	CONVERTED TO HIGH SCHOOL			347	(1-5) 226
	N			512				(1-5) 489	560
Richton Cap. 759	W	(1-6)	507	(1-6) 518	(1-5) 438	(1-5) 436	481	439	460
	N		237	243	348	343	(3-5) (Shepard 1-2) 241 Tot. Cap. 1287	(1-5) 348	(1-6) 260

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[41] Under this plan two or more schools are paired in order to house one group of elementary students. This column indicates the particular grades ggested for the school, the schools which are to be included in the pairing, and the total capacity of the buildings. Where more than one school to be used for the one group of grades, the school other than the one in the left hand column will be shown in this column without parenthesis. e, e.g. Council.

[42] The total capacity for the Arlington-Council facilities is 1023.

[43] The Board's plan does not propose any change in the elementary and middle schools located west of I-65 and no enrollment projection statistics e available for those schools.

[44] Attachment D 1 to the affidavit of James McPherson which provides the basis for the March 23 attendance statistics does not show enrollment figure those schools west of I-65 not affected by the district court's order.

[45] See footnote 43.

School			September 1969	Board Plan	HEW Plan B	HEW Plan B-Alt.	HEW Plan B-1 Alt.	Government Jan. 27 Plan	March 23 Attendance
Dickson Cap. 742	W	(1-6)	835	--------	680 (1-5)	680 (1-5)	195 (1-2) (Stanton Road 3-5) 534 Tot. Cap. 1714	835 (1-6)	--------
	N		193		125	125		193	
Dodge Cap. 793	W	(1-6)	675	--------	565 (1-5)	565 (1-5)	351 (1-2) (Williams 3, Owens 1-2) 506 Tot. Cap. 2674	675 (1-6)	---------
	N		65		45	45		65	
Eight Mile Cap. 660	W	(1-8)	506	--------	230 (1-6)	280 (1-6)	98 (1-2) (Grant 3-5) 250 Tot. Cap. 1848	280 (1-6)	--------
	N		110		66	66		66	
Emerson (Southside)[47] Cap. 696	W	(1-6)	4	16 (1-6)	CLOSE	3 (1-5)	CLOSE	CLOSED	
	N		354	340		518			
Fonde Cap. 825	W	(1-6)	679	--------	605 (1-5)	605 (1-5)	405 (1-2) (Palmer-Glendale 3-5) 450 Tot. Cap. 2112	679 (1-6)	--------
	N		11		236	11		161	
Fonvielle Cap. 1155	W	(1-6)	0	8 (1-6)	CONVERTED TO MIDDLE SCHOOL	0 (1-5)	400 (3-5) (Forest Hill 1-2) 666 Tot. Cap. 1815	0 (1-5)	3 (1-6)
	N		1209	1153		1000		1000	1175
Forest Hill Cap. 660	W	(1-5)	560	--------	586 (1-5)	586 (1-5)	204 (1-2) (Fonvielle 3-5) 334 Tot. Cap. 1815	560 (1-5)	--------
	N		0		355	0		95	
Glendale Cap. 693	W	(1-6)	503	444 (1-5)	434 (1-5)[48]	434 (1-5)	634 (3-5) (Fonde 1-2)	434 (1-5)	402 (1-5)
	N		149	206	Palmer 931	Palmer 931	Palmer 717 Tot. Cap. 2112	Palmer 913	188
Gorgas Cap. 850	W	(1-6)	2	8 (1-6)	7 (1-5)	3 (1-5)	449 (1-3) (Orchard 4-5) 441 Tot. Cap. 1597	7 (1-5)	2 (1-6)
	N		1153	1150	960	953		963	1171
Grant Cap. 1188	W	(1-5)	1	15 (1-5)	15 (1-5)	15 (1-5)	197 (3-5) (Eight Mile 1-2) 1101 Tot. Cap. 1848	15 (1-5)	1 (1-5)
	N		1274	1250	1285	1285		1285	1275

47/ The Emerson School building was apparently abandoned sometime during the 1969-70 school year and the children were moved to the old Southside Junior High School which the Board had closed in 1968 because of its condition. The capacity figure used for Emerson is the listed capacity for the Southside plant. The capacity of the Emerson School when it was used was 528.

48/ The total capacity for the Palmer-Glendale facilities is 1287.

School			September 1969	Board Plan		HEW Plan B		HEW Plan B-Alt.
Hall Cap. 1188	W	(1-6)	0	CONVERTED TO MIDDLE SCHOOL	(1-5)	483	(1-5)	483
	N		686			664		664
Hamilton Cap. 600	W	(1-6)	629	625	(1-5)[49]	638	(1-5)	638
	N		0	0	Robbins	855	Robbins	855
Howard Cap. 429	W	(1-6)	0	21	CLOSE		(1-5)	0
	N		447	465				465
Indian Springs Cap. 429	W	(1-6)	520	--------	(1-6)	535	(1-6)	535
	N		12			11		11
Lienkauf Cap. 495	W	(1-6)	268	258	(1-5)	273	(1-5)	273
	N		177	96		165		165
Maryvale Cap. 594	W	(1-6)	548	478	(1-5)	472	(1-5)	472
	N		55	130		145		15
Mertz Cap. 528	W	(1-6)	461	496	(1-5)	402	(1-5)	402
	N		0	0		120		0
Morningside Cap. 561	W	(1-6)	740	631	(1-5)	636	(1-5)	636
	N		0	0		120		0
Old Shell Road Cap. 495	W	(1-6)	249	250	(1-6)	232	(1-5)	232
	N		112	120		295		295
Orchard Cap. 792	W	(1-5)	754	--------	(1-5)	759	(1-5)	759
	N		113			125		117
Owens Cap. 1485	W	(1-6)	0	0	(1-5)	2	(1-5)	2
	N		1100	1237		1414		1414

49/ The total capacity for the Robbins-Hamilton facilities is 1485.

n	HEW Plan B-1 Alt.		Government Jan. 27 Plan		March 23 Amendment
	591				
	(1-3) (Maryvale 4-5)		MIDDLE SCHOOL		
	458 Tot. Cap. 1782				
	800		638		586
	(3-5) (Chickasaw 1-2)	(1-5)		(1-6)	
	Robbins 693 Tot. Cap. 2112	Robbins	855		0
					8
	CLOSE		CLOSE	(1-6)	
					410
	190		535		
	(1-2) (Brazier 3-5)	(1-5)		----------	
	221 Tot. Cap. 1551		11		
	273		273		176
	(5) (Westlawn 1-2, Hertz 3-4)	(1-5)		(1-5)	
	33 Tot. Cap. 1551		215		279
	380		414		479
	(4-5) (Hall 1-3)	(1-5)		(1-5)	
	236 Tot. Cap. 1782		167		167
	402		498		438
	(3-4) (Westlawn 1-2, Lienkauf 5)	(1-5)		(1-6)	
	66 Tot. Cap. 1551		104		0
	369		631		749
	(1-2) (Arlington-Council 3-5)	(1-5)		(1-6)	
	222 Tot. Cap. 1584		100		0
			232		269
	CLOSE	(1-5)		(1-6)	
			295		110
	313		754		
	(4-5) (Gorgas 1-3)	(1-5)		----------	
	639 Tot. Cap. 1815		113		
	184		2		0
	(4-6) (Dodge 1-2, Williams 3)	(1-5)		(1-6)	
	1100 Tot. Cap. 2674		1414		1328

School			September 1969	Board Plan	HEW Plan B	HEW Plan B-Alt.	HEW Plan B-1 Alt.	Government Jan. 27 Plan	March 23 Attendance
Palmer Cap. 594	W	(1-5)	57	(1-5) 60	(1-5) 50/434	(1-5) 434	634 (3-5) (Fonde 1-2)	(1-5) 434	(1-5) 65
	N		674	660	Glen. 931	Glen. 931	Glen. 717 Tot. Cap. 2112	Glen. 931	610
Robbins Cap. 825	W	(1-5)	6	(1-5) 2	(1-5) 51/638	(1-5) 638	800 (3-5) (Chickasaw 1-2)	(1-5) 638	(1-5) 9
	N		815	805	Hamil. 855	Hamil. 855	Hamil. 693 Tot. Cap. 2112	Hamil. 855	841
Shepard Cap. 528	W	(1-6)	409	--------	(1-5) 383	(1-5)	410 (1-2) (Crichton 3-5)	(1-6) 409	--------
	N		29		160	43	150 Tot. Cap. 1287	29	
South Brookley Cap. 429	W	(1-6)	499	(1-6) 502	(1-6) 514	(1-6) 514	224 (4-5) (Caldwell 1-3)	(1-6) 502	(1-6) 501
	N		75	71	72	72	218 Tot. Cap. 1023	71	79
Stanton Road Cap. 990	W	(1-6)	0	(1-6) 14	(1-5) 6	(1-5) 6	491 (3-5) (Dickson 1-2)	(1-5) 6	(1-6) 1
	N		977	1077	900	900	491 Tot. Cap. 1717	900	984
Thomas Cap. 297	W	(1-6)	222	--------	(1-5) 180	(1-5) 180	123 (1-2) (Whitley 3-5)	(1-5) 180	--------
	N		101		95	95	235 Tot. Cap. 891	95	
Westlawn Cap. 528	W	(1-6)	516	(1-6) 483	(1-5) 495	(1-5) 495	495 (1-2) (Mertz 3-4, Lienkauf 5)	(1-5) 432	(1-6) 507
	N		0	0	75	0	66 Tot. Cap. 1551	50	0
Whistler Cap. 726	W	(1-6)	227	--------	(1-5) 181	(1-5) 181	462 (1-2) (Will 3-5)	(1-5) 181	--------
	N		231		205	205	178 Tot. Cap. 1518	205	
Whitley Cap. 594	W	(1-5)	0	(1-5) 0	(1-5) 216	(1-5) 216	273 (3-5) (Thomas 1-2)	(1-5) 216	(1-5) 0
	N		395	421	481	481	341 Tot. Cap. 891	481	388
Will Cap. 792	W	(1-5)	657	--------	(1-5) 678	(1-5) 678	397 (3-5) (Whistler 1-2)	(1-5) 657	--------
	N		175		395	355	422 Tot. Cap. 1518	175	
Williams Cap. 396	W	(1-6)	497	(1-6) 571	(1-6) 571	(1-6) 571	303 (3) (Dodge 1-2, Owens 4-6)	(1-6) 571	(1-6) 562
	N		60	43	43	43	225 Tot. Cap. 2674	43	56
Woodcock Cap. 594	W	(1-6)	239	(1-5) 249	CONVERTED TO MIDDLE SCHOOL		AS PART OF EANES	(1-5) 424	(1-5) 191
	N		119	170				217	203

50/ See footnote 48.

51/ See footnote 49.

MIDDLE SCHOOLS

School			September 1969	Board Plan	HEW Plan B	HEW Plan B-Alt.	HEW Plan B-1 Alt.	Government Jan. 27 Plan	March 23 Attendance
Azalea Rd. Cap. 1015	W	(7-8)	1039	----------	(6-7) 857	(6-7) 857	----------[52]	(7-8) 1039	--------
	N		38		133	133		38	
Carver Cap. 1023	W	(6-7)	1	(6-8) 8	CONVERTED TO HIGH SCHOOL		----------	USED AS HIGH SCHOOL	(6-8) 0
	N		857	867					920
Central Cap. 1508	W		USED AS HIGH SCHOOL		[22] (6-9) 1044	(6-9) 1044	----------	(6-9) 468	USED AS HIGH SCHOOL
	N				1562	1562		1206	
Clark Cap. 1390	W	(7-9)	1089	(7-9) 1242	(8) 536	(8) 536	----------	(8) 536	(7-9) 1071
	N		203	278	948	948		948	267
Craighead Cap. 891	W	(6-7)	119	ELEMENTARY SCHOOL	CONVERTED TO HIGH SCHOOL		----------	USED AS ELEMENTARY SCHOOL	
	N		405						
Dunbar Cap. 1131	W	(7-8)	2	(7-8) 6	(6-9)[54] 1044	(6-9) 1044		(6-9) 181	(7-8) 4
	N		837	912	Central 1562	1562		985	806
Eanes Cap. 1218	W	(7-9)	966	(6-8) 911	(6-8) 930	(6-9)[55] 980	----------	(6-9)[56] 1292	(6-8) 994
	N		134	160	Wdck. 764	Wdck. 764		Hall 977	283
Fonvielle Cap. 1155	W		USED AS ELEMENTARY SCHOOL		[57] (6-9) 1040	USED AS	ELEMENTARY SCHOOL		
	N				Phil-Wash. 1562				
Hall Cap. 1188	W	(1-6)	0	(6-8) 182	USED AS ELEMENTARY SCHOOL			(6-9) 1292	(5-8) 137
	N		686	573				Eanes 977	817

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[52] Under Plan B-1 Alternative the same middle school and high school plans proposed in Plan B or Plan B-Alternative could be used. If Plan B were used, Toulminville would be substituted for Fonvielle as part of the Washington-Phillips middle school facility.

[53] The total capacity for the Dunbar-Central facilities is 2639.

[54] Ibid.

[55] Under Plans B and B-Alternative Eanes would be used with Woodcock as a middle School. The combined capacities of the two facilities would be 1812.

[56] The total capacity for the Eanes-Hall facilities is 2406.

[57] The total capacity for the Phillips-Washington-Fonvielle facilities is 3271.

School			September 1969	Board Plan	HEW Plan B	HEW Plan B-Alt.	HEW Plan B-1 Alt.	Government Jan. 27 Plan	March 23 Attendance
Hillsdale Cap. 847	W	(6-8)	431	--------	(8) 858	(8) 858	----------	(6-8) 638	--------
	N		217		131	131		77	
Mob. Co. Tr. Cap. 1305	W	(6-12)	0	(6-12) 102	(6-7) 432	(6-7) 432	----------	(6-7) 432	(6-8) 2
	N		1283	1177	859	859		859	1188
Phillips Cap. 1073	W	(7-8)	752	(7-8) 861	(6-9) 58/ 1040	(6-9 1040	----------	(6-9) 59/ 1170	(7-8) 710
	N		122	171	Wash-Fon 1562	Wash-Fon 1562		Wash. 1716	176
Prichard Cap. 609	W	(6-9)	353	(6-8) 340	(6-7) 240	(6-7) 240	----------	(6-7) 240	(6-8) 308
	N		170	167	410	410		410	209
Main Cap. 986	W	(7-12)	1296	(7-12) 1150	(7-12) 1150	(7-12) 1150	----------	(7-12) 1150	(7-12) 1106
	N		112	97	97	97		97	116
Scarborough Cap. 1000	W	(6-8)	638	--------	(6-7) 855	(6-7) 855	----------	(6-8) 638	--------
	N		77		133	133		77	
Toulminville Cap. 609	W		USED AS HIGH SCHOOL			60/ (6-9) 1040	----------	USED AS HIGH SCHOOL	
	N					Fon-Phil. 1562			
Trinity Gard. Cap. 899	W	(7-12)	0	(6-8) 0	(6-7) 380	(6-7) 380	----------	(6-7) 380	(6-8) 0
	N		1084	992	690	690		690	964
Washington Cap. 1043	W	(7-9)	0	(7-9) 16	61/ (6-9) 1040	(6-9) 1040	----------	62/ (6-9) 1170	(7-9) 0
	N		1528	1559	Fon-Phil 1562	Phil-Toul 1562		Phillips 1716	1462
Williamson Cap. 1350	W	(8-12)	1	USED AS HIGH SCHOOL ONLY			----------	USED AS HIGH SCHOOL	
	N		1142						
Woodcock	W		USED AS ELEMENTARY SCHOOL		(6-9) 980	(6-9) 980			
	N				Eanes 764	Eanes 764			

58/ Ibid.

59/ The total capacity of the Phillips-Washington facilities is 2116.

60/ The total capacity of the Toulminville-Fonvielle-Phillips facilities is 2837.

61/ See footnote 57.

62/ See footnote 57.

HIGH SCHOOLS

School		September 1969	Board Plan	HEW Plan B	HEW Plan B-Alt.	HEW Plan B-1 Alt.	Government Jan. 27 Plan	March 23 Attendance
Bienville Cap. 660	W	USED AS ELEMENTARY SCHOOL		Blt-Carv[63/] 1908 (9-12) Vigor 2962	Blt-Carv 1908 (9-12) Vigor 3516	----------	(9-12)[64/] 1134 Vigor 1211	ELEMENTARY SCHOOL
	N							
Blount Cap. 1972	W	(8-12) 0	(9-12) 22	Vig-Bien 1908 (9-12) Carver 2962	Vig-Bien 1908 (9-12) Carver 3516	----------	(9-12)[65/] 854 Carver 1846	(9-12) 0 1748
	N	1893	1875					
Carver Cap. 1023	W	USED AS MIDDLE SCHOOL		Vig-Bien 1908 (9-12) Blount 2962	Vig-Bien 1908 (9-12) Blount 3516	----------	854 (9-12) Blount 1846	MIDDLE SCHOOL
	N							
Central Cap. 1508	W	(9-12) 0	(9-12) 17	CONVERTED TO MIDDLE SCHOOL		----------	MIDDLE SCHOOL	(9-12) 0 1254
	N	1470	1372					
Davidson Cap. 1972	W	(9-12) 2302	(9-12) 2150	(9-12) 1738	(9-12) 1738	----------	(9-12) 2302	(9-12) 2363
	N	72	70	604	51		72	73
Mobile Co. Tr. Cap. 1305	W	(6-12) 0	(6-12) 102	USED AS MIDDLE SCHOOL ONLY		----------	MIDDLE SCHOOL	(6-12) 2
	N	1283	1177					1188
Murphy Cap. 2913	W	(9-12) 2602	(9-12) 2171	(10-12) 1440	(10-12) 1440	----------	(10-12) 1643	(9-12) 2247
	N	239	425	1360	1913		1761	490
Rain Cap. 986	W	(7-12) 1296	(7-12) 1150	(7-12) 1150	(7-12) 1150	----------	(7-12) 1150	(7-12) 1106
	N	112	97	97	97		97	116
Shaw Cap. 1044	W	(9-12) 1242	(9-12) 1250	(9-12) 1150	(9-12) 1150	----------	(9-12) 1250	(9-12) 1179
	N	237	240	471	396		240	220
Toulminville Cap. 609	W	(10-12) 0	(10-12) 20	(12) 0	CONVERTED TO MIDDLE SCHOOL	----------	(10-12) 9	(10-12) 0
	N	1135	1145	365			940	1097
Vigor Cap. 1769	W	(10-12) 1504	(9-12) 1296	Blt-Carv 1908 (9-12) Bien. 1962	Blt-Carv 1908 (9-12) Bien. 3516	----------	(9-12) 1134 Bien. 1211	(9-12) 1474
	N	195	468					480
Williamson Cap. 1350	W	(8-12) 1	(9-12) 762	[66/]1008 (10-12) Craig. 767	1008 (10-12) Craig. 767	----------	880 (10-12) 471	(9-12) 625 90
	N	1142	474					

[63/] The total capacity of the Bienville-Blount-Carver-Vigor facilities is 5424.

[64/] The total capacity for the Vigor-Bienville facilities is 2241.

[65/] The total capacity for the Blount-Carver facilities is 2995.

[66/] The total capacity of the Williamson-Craighead facilities is 2241.

APPENDIX C

This appendix lists the non-contiguous or split attendance zones which were recommended or noted on the annual Pupil Placement Recommendations of school board (Appendix A to Trial Brief), except for the inclusion of a part of South Brookley in the Hall zone. The latter example is taken from the Report on Research Of The Pupil Placement Office For Use In Planning For The Full Utilization Of School Facilities In The Downtown Area (Appendix B to Trial Brief). In some instances not all grades are assigned from the split part of the zone, and in other cases only students of one race living in the split zone are assigned. The chart shows the area assigned to a school other than the one located in its geographic zone, the school to which it is assigned, and the approximate distance from the middle of the split area to the school to which it is assigned.

INSTANCES WHERE THE SCHOOL BOARD HAS ASSIGNED OR RECOMMENDED STUDENT ASSIGNMENT USING NON-CONTIGUOUS ZONES

Year	*Non-Contiguous Area Assigned*	*Distance between Area and School*	*School*
1963-64	Brookley Air Force Base	3.6 miles	Woodcock
	Owens	3.6 miles	Carver
	Highway 98	8.8 miles	Washington
	Whistler	1 mile	Whistler
	Highway 98	10 miles	Warren
	So. Morningside	5.1 miles	Oakdale
	Hillsdale	14.5 miles	St. Elmo
	Mobile Terrace	UNKNOWN	St. Elmo
	Brookley Air Force Base	9.5 miles	Theodore
	Highway 98	9.6 miles	Toulminville
1964-65	Highway 98	3.5 miles	Hillsdale
	Oakdale	2.2 miles	Barton
	Lee	4.5 miles	Ellicott
	Lee	7.8 miles	Gorgas
	So. Morningside	4.5 miles	Craighead
	Griggs	11.4 miles	Old Shell Rd.
	Indian Springs	9.8 miles	Prichard Jr. Hi.
	Whistler	3.4 miles	Prichard Jr. Hi.
	Shaw	16 miles	Tanner-Williams
	Shaw	10 miles	Semmes
	Shaw	10.8 miles	Barton
	Adams	2 miles	Blount High
	Fonvielle	1.9 miles	Palmer
	Highway 98 West	3.5 miles	Hillsdale
	Thomas	3.2 miles	Mobile Cty. Trng.
	So. Brookley	6.6 miles	Hall
	Owens	3.8 miles	Williamson Hi.
	Owens	4.1 miles	Hall
	Wolf Ridge Area	3.1 miles	Crichton
1965-66	Whitley	1.6 miles	Adams
	Mobile Co. Trng.	2 miles	Adams
	So. Morningside	4.5 miles	Craighead
	So. Brookley	7.4 miles	Craighead
1966-67	Gorgas	1.9 miles	Old Shell Rd.
	Gorgas	3.4 miles	Phillips
	Saraland-Satsuma	6.3 miles	Mobile Co. Trng.
	Cottage Hill	5.7 miles	Dickson
	Lloyd Station	3.8 miles	Hall
	Lloyd Station	4.1 miles	Williamson Hi.
	Austin	3.2 miles	Warren
	Austin	4.6 miles	Washington Hi.
	Austin	5.1 miles	Toulminville Hi.

APPENDIX D

This Appendix reflects the number of portable and permanent classrooms used or recommended at schools in the Mobile system between 1964 and 1968 where there were substantial portions of the total capacities housed in portable classes. The data were obtained from Pl. Ex. 22, 23 and Pl.-Int. Ex. 29 at the July 1967 Hearing and A. No. 26,886, Vol. I, pp. 90-94.

SCHOOLS WHICH HAVE HAD MAJOR PORTIONS OF THEIR STUDENTS HOUSED IN PORTABLES

Year	*School*	*Portable Classrooms*	*Permanent Classrooms*
1964–65	Burroughs	3	10
	Calcedeavor	3	8
	Cleveland	7	8
	Cottage Hill	1	3
	Council	5	18
	Dixon	7	5
	Fonde	7	14
	Forest Hill	6	20
	Griggs	12	16
	Hillsdale	24	0
	Hollinger's Island	4	12
	Mobile County	6	20
	Mobile County Training	11	19
	Morningside	5	15
	Mount Vernon Elementary	8	10
	Semmes	12	27
	Shepard	9	16
	Stanton Road	15	11
	Trinity Gardens	5	25
	Williamson	15	35
	20 Schools	165	292
1966–67	Baker	9	20
	Blount	14	38
	Calcedeavor	3	7
	Citronelle	18	33
	Cleveland	7	8
	Cottage Hill	2	2
	Council	7	17

SCHOOLS WHICH HAVE HAD MAJOR PORTIONS OF THEIR STUDENTS HOUSED IN PORTABLES (Continued)

Year	*School*	*Portable Classrooms*	*Permanent Classrooms*
1964–65 (Cont'd.)	Dixon	7	5
	Fonvielle	13	35
	Grant	10	36
	Griggs	10	16
	Hillsdale	7	15
	Hollinger's Island	5	12
	Mobile County High School	12	19
	Mobile County Training	17	18
	Morningside	7	15
	Mount Vernon Elementary	9	10
	Northside	8	13
	Palmer	7	17
	Shaw	7	16
	Shepard	17	16
	Thomas	4	8
	Vigor	8	29
	Washington	9	24
	24 Schools	211	429
1967–68	Baker	9	20
	Belsaw	10	10
	Blount	18	38
	Calcedeavor	3	7
	Cleveland	6	8
	Council	5	17
	Dixon	8	5
	Garc	1	0
	Griggs	11	16
	Hillsdale	8	15
	Hollinger's Island	4	12
	Howard	7	13
	Mobile County High School	15	19
	Mobile County Training	21	14
	Morningside	7	15
	Palmer	5	18
	Rain	8	14
	Satsuma	9	25
	Shaw	17	16
	Shepard	11	16
	Thomas	5	8
	Vigor	8	29
	Washington	10	24
	Williamson	10	18
	24 Schools	216	377

SCHOOLS WHICH HAVE HAD MAJOR PORTIONS OF THEIR STUDENTS HOUSED IN PORTABLES (Continued)

Year	*School*	*Portable Classrooms*	*Permanent Classrooms*
1968–69	Austin	3	12
	Azalea Road Jr. High	6	21
	Baker	10	21
	Belsaw Jr. High	9	10
	Blount High School	19	44
	Calcedeavor	4	5
	Griggs	12	18
	Gorgas	8	26
	Hillsdale High	8	15
	Hollinger's Island	4	12
	Howard Elementary	7	14
	Mobile County High School	18	19
	Morningside	7	15
	Palmer	7	18
	Rain	9	14
	Satsuma	12	25
	Shaw	15	24
	Thomas	5	9
	Toulminville	13	12
	Trinity Gardens	6	17
	Washington	15	24
	Williamson	17	7
	22 Schools	214	382